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CONVEYANCER'S NOTEBOOK

LAND CHARGE SEARCHES

A correspondent writes to say that he recently made a search under the Land Charges Act, 1925, against the vendor giving the correct particulars of the property (county, parish, place or district, name) and the name, address and occupation of the vendor. He received a clear certificate of search. Completion was delayed and so he put in another search. This time the certificate disclosed an entry as being one which might or might not affect the property. The correspondent took the matter up with the Registry and was told that both certificates were in order—and so they were.

We recently had the privilege, through the courtesy of the Chief Land Registrar, of going over the Registry and it is possible that practitioners do not realise the technical difficulties. Let us assume that land is conveyed in fee simple to John William Green and the land is described as being in Marsham, Essex. Subsequently the purchaser grants a lease with an option to purchase and in the lease he is described as William Green or John William Greene or the property is described as being in Kidham (a postal address). The lessee may register the option accordingly. In due course Mr. Green sells the fee simple and his purchaser searches against John William Green and describes the property as being in Marsham, Essex. If the registration of the option is picked up, the lessee can consider himself lucky, for the odds are that in the land charges index William Green will be a long way from John William Green and John William Greene will be after all the Greens. If the lessee described the land by a postal address, whether the registration would be picked up or not would depend

partly on luck and partly on the attitude of the official in the Registry making the search. Assuming the search were against the correct name and there were other similarities, such as the estate owner's address, to connect the particulars in the application for search with those in the registration so as to suggest a connection, the entry would be disclosed, but obviously whether there is sufficient connection in any particular case is a matter of opinion.

Returning to our correspondent's case, the original registration was wrong as the property was described by a postal address, which was not a correct geographical address. The first certificate was right, for there was nothing in fact registered against the property by a correct description. The second was equally right, for it disclosed an entry that might be—and in fact was—relevant.

There are two morals to be drawn. First, when registering, make sure you have the correct particulars. If there is any doubt as to the name, register under all possible alternatives and be thankful that Sir Walter Raleigh is not granting land charges. There is no excuse for getting the county and county district or borough wrong, and, if these are right, you can probably sleep quietly, though, even then, your charge may be missed, for a subsequent applicant may describe the property by "place," which may be different from the district or borough. If the rules were altered to make the district or borough an obligatory part of the description, this difficulty would be overcome.

Secondly, in searching be very careful about the name and the description of the property, but you need not give the street or number. If in any doubt, search against the county and district or borough and omit the detailed description.

First Registration

This leads to a rather analogous point to which our attention was drawn in connection with a first registration of title at the Land Registry. There were several sets of restrictive covenants affecting the property and the solicitor made searches to see whether any were not registered. Some were not, and so, though his conveyance referred to them, he asked that no reference should be made to them in the land certificate. In error, the land certificate included a reference to the covenants. When the error was pointed out, the Registry immediately agreed to rectify the certificate, but added:

> "It is, however, pointed out that the entry of covenants on the register does not necessarily mean that the covenants are enforceable. Entry on the register merely gives notice of such covenants, it being no part of the duty of the Chief Land

Registrar to adjudicate upon the enforceability or otherwise of the restrictive covenants."

This is quite true, but once covenants are on the register it is difficult to ignore them completely: they cannot just be "forgotten" in subsequent conveyances until they disappear from the title.

In the particular case the search had been made against a number in a street, whereas the conveyance imposing the covenant referred to a much larger area of land without street name or number. Did the search certificate give protection? The Land Charges Rules, 1925, r. 9, prescribes that applications for official searches "shall be made on, and shall furnish the particulars set forth in," the form given in the Schedule to the Rules, or on such other form as the Registrar shall from time to time determine. The prescribed form specifies the county and parish, place or district. The form currently in use provides for a description and former description of the land. When it is borne in mind that the form for registration of a land charge does not require the description of the land to be inserted, it seems clear that the description in the search form is only for convenience and cannot be a trap for the applicant for a search certificate. The omission of the former description of the land is, it is submitted, not fatal to the protection given by the certificate. Otherwise an applicant with no knowledge of any former description or of a particular instrument imposing a charge might be bound by an undisclosed charge. The moral, again, appears to be that, if in doubt, give as few particulars as possible.

The other point of interest is as to the entries in the land certificate. On first registration, a solicitor applies for a particular title and it is, of course, up to him to prove it. If he fails to prove it to the satisfaction of the Chief Land Registrar, obviously he cannot insist on just what he wants, for the insurance fund might be placed in jeopardy. The Registrar, if not satisfied, may refuse an absolute title and, in an appropriate case, offer a qualified title. It is submitted that the Registrar, if not satisfied on a particular point, cannot insist on entries to which the applicant objects. If necessary, the matter could be referred to the court for a decision by invoking the machinery of proviso (c) of section 13 of the Land Registration Act, 1925. No doubt, in practice one side will satisfy the other. Our experience of the Land Registry has always been that they never refuse to listen to a reasoned application for alteration of a land certificate delivered on first registration. Practitioners, however, must bear a large share of blame if they do not get what they want. Too many,

we regret to say, bother little about what appears on the certificate. For example, we can never understand why so few apply for absolute title to leasehold land when they are in a position to do so.

LAND REGISTRY NOTICE

The following has been received from the Chief Land Registrar:—

The Chief Land Registrar gives notice that compulsory registration of title on sale will begin on March 1, 1957, in the following parts of the County of Kent:—

> The municipal boroughs of Chatham, Gillingham and Gravesend; the City of Rochester; the urban districts of Swanscombe and Northfleet; and the rural district of Strood.

In these areas conveyances on sale of freehold land, leases for not less than 40 years and assignments on sale of leasehold land having not less than 40 years to run made on or after March 1, 1957, must be registered within two months from the date of the particular instrument.

Maps showing the boundaries of these areas have been deposited for inspection at the offices of the undermentioned local Law Societies.

Bromley & District Law Society,
18, St. Mary's Avenue,
Shortlands,
Bromley,
Kent.

Kent Law Society,
42, Earl Street,
Maidstone.

Gravesend & District Law Society,
77, New Road,
Gravesend.

Tunbridge Wells, Tonbridge & District Law Society,
11, Church Road,
Tunbridge Wells.

Isle of Thanet Law Society,
28, Cavendish Street,
Ramsgate.

Rochester, Chatham & Gillingham Law Society,
18, Star Hill,
Rochester.

When a reference to a deposited map proves inconclusive H.M. Land Registry may be consulted either by writing or by telephone (HOLborn 3488, Extension 130).

INSURANCE

Balfour v. *Barty-King* [1957] 2 W.L.R. 84 is hardly a surprising decision, even if most of us remember "escape of fire" as one of the things we studied when doing the law of torts and dismissed

from our minds after qualifying. A fire, started by the negligence of an independent contractor employed by the defendant, escaped and caused considerable damage to adjoining property. The defendant was held liable. What is surprising is that most fire insurance policies do not, or at any rate did not, cover the spread of fire and solicitors ought to look into their clients' policies.

Costs

There have been two recent decisions on conveyancing costs of some interest, *Broughton* v. *Thorne* [1957] 1 W.L.R. 223 and *Re Taxation of Costs* [1957] 1 W.L.R. 280. In both cases taxing masters sought to say that a vendor's solicitor was only entitled to charge scale fees if they do the first three of the four things mentioned in the Remuneration Order, 1882, Sched. I, Part I, *i.e.*, deducing title, perusing conveyance, completing conveyance and preparing contract or conditions: *Re Lacey* (1883) 25 Ch.D. 301. In the former case, Vaisey J. held that *Re Lacey* did not, on the wording of the Solicitors' Remuneration (Registered Land) Order, 1925, apply to registered land, for the scale is payable "for every completed transfer on sale." In the second case, although the decision was again in favour of the solicitors, Jenkins L.J. said, at p. 285,

> "I do not, however, wish it to be thought that we are deciding that in every case any solicitor who takes any part in the business leading up to the completed transfer of registered land must necessarily be entitled to the whole of the scale charge. I think the principle stated in the case of *Re Lacey & Son* applies to remuneration in respect of registered land as it does to remuneration with respect to unregistered land."

The other member of the court, Singleton L.J., did not go so far, saying, at p. 283,

> "It appears to me that, on the strict reading of paragraph 1 of the Solicitors' Remuneration Order of 1925, the solicitors did the main part of the work mentioned in the Order, which entitled them to the scale charge."

Vaisey J.'s decision was not apparently cited to the Court of Appeal.

One point from the second decision is rather puzzling. Singleton L.J. states that after the vendor had entered into a contract to sell the property he changed his solicitors. The conditions of sale were not in order so that the second solicitors had some work to do in connection with the contract. It is a little difficult to

understand how, once the contract was entered into, the conditions could be put in order without a variation of the contract.

The learned judge also expressed surprise as to the amount of the scale fee saying, "it may mean that the question of scale fees is worthy of examination." The scale fee concerned was £53 2s. 6d. on sale of £7,500. (The estate agent's fee on this amount would be £170.) Can it really be suggested that a fee of under three-quarters per cent. is too much? There seems to be an air of unreality about the matter. Solicitors' charges, we venture to suggest, have shown by far the least increases on those prevailing before the war, of any profession. Scale fees have considerable merit: the solicitor knows in advance what he will get, though he equally knows he will have to take the rough with the smooth; the client knows what he will have to pay and can make his plans accordingly. What is quite unfair is to try to make the economies on solicitors' charges.

AGRICULTURAL NOTICES TO QUIT: A DILEMMA

By C. M. Kidd, m.a., ll.b., Solicitor

The modern agricultural tenant is, at law, under a double duty: he is required by common law to observe all the terms of his contract with his landlord, and he is required by statute to maintain a high standard of efficiency in the husbandry of his holding. This is an onerous duty, and, if the tenant is to discharge it properly, there must be made available to him reasonable means of protection against eviction by his landlord.

Common law gives a tenant little protection of this sort. If he is holding under a tenancy for a term certain, then, of course, common law can enforce his right to remain in possession until that term expires. But most agricultural tenancies are yearly tenancies, and, if a landlord gives a notice, valid at law and in accordance with the contract of tenancy, to determine the tenancy, common law can do nothing to prevent that notice from running its course.

For some years prior to 1947, however, the rigours of common law had, to a certain extent, been mitigated for tenant farmers by various statutes, culminating in the Agricultural Holdings Act, 1923, itself a consolidating measure. That Act consisted of fifty-eight sections and four Schedules, but only two of its provisions need be mentioned here, and briefly, at that. First, sections 12 to 14 discouraged landlords from capriciously giving notice to quit by requiring the payment of compensation for disturbance (except in certain cases) to tenants whose tenancies were terminated by notice to quit. And, secondly, section 25 insisted that (again with certain exceptions) a notice to quit should never be less than a twelve months' notice, whatever the parties might have agreed. Then, in 1947, there was enacted the Agriculture Act of that year. This was a comprehensive measure, and introduced a new approach to the problem of security of tenure. Finally, the Agricultural Holdings Act, 1948, repeated and reproduced, within the ambit of one Chapter, the previous statutory provisions relating to agricultural tenancies; and it is to this Act (which will hereinafter be called "the 1948 Act") and the conglomeration of statutory instruments which depend thereon that the modern agricultural tenant looks for security of tenure. The first noteworthy section of the 1948 Act is section 2, which effectively ensures that agricultural holdings shall not be let on less than yearly tenancies. The Act

thereafter contains a great many provisions designed to assist a tenant to remain in possession. The most far-reaching of these —and the one with which this article is really concerned—is section 24, which (as its marginal note says) places restrictions on the operation of notices to quit.

Now, one result of the enactment of section 24 of the 1948 Act is that "the script of the common law has been overwritten by the Act, and the two have to be integrated together" (*a*). It is difficult to apply this, so to speak, composite ordinance. For, while the script of the common law has been overwritten, it has not been obliterated (*b*); and section 24 is so constructed that it is not easy to understand its wording or to grasp just how the section is intended to work. As a result, a tenant who has been served with a notice to quit may, in certain circumstances, find himself in a dilemma. It may not, however, be out of place if the nature and object of a notice to quit are briefly examined before attention is turned to the difficulties of the section.

Common law notice to quit

What, then, is a notice to quit? "It is commonly so called, because the effect of it is, that on its expiration the tenant must quit the premises, but it is in reality a notice to determine the tenancy" (*c*). Here is the kernel of the whole matter. A landlord who gives a notice to quit does so because he desires to put an end to the contract of tenancy. That being so, the reasons which caused him to become possessed of that desire are of no concern to the tenant. At common law a landlord need give no reasons for his action; and even if he does—and even if they are bad, or inapposite—that fact will not invalidate the notice (*d*). All that common law requires is that the notice shall be clear and unambiguous, "so as to show the tenant what the landlord has bound himself to do—no longer to require of the tenant to pay rent or to be treated as a tenant" (*e*).

Agricultural Holdings Act, 1948, s. 24

The right to determine a periodic tenancy by notice to quit is, at common law, an inseparable incident to the tenancy. The

(*a*) *Per* Denning L.J. in *Cowan* v. *Wrayford* [1953] 2 All E.R. 1138, 1142.
(*b*) Consider, for example, the part played by common law in the solution of the difficulties posed in *Ward* v. *Scott* (1950) 66 T.L.R. (Pt. 1) 340; *Woodward* v. *Dudley* (*Earl of*) [1954] Ch. 283; [1954] 1 All E.R. 559; and *Mountford* v. *Hodkinson* [1956] 1 W.L.R. 422; [1956] 2 All E.R. 17; and *Hammon* v. *Fairbrother* [1956] 2 All E.R. 108.
(*c*) *Per* Bramwell L.J. in *Ahearn* v. *Bellman* (1879) 4 Ex.D. 201, 203.
(*d*) See the remarks of Denning L.J. in *Cowan* v. *Wrayford* (*ante*) at p. 1142.
(*e*) *Per* Cotton L.J. in *Ahearn* v. *Bellman* (*ante*) at p. 212.

1948 Act in no way deprives a landlord of his right to give such a notice: what the Act, in fact, does is to place restrictions on the operation of a notice so given. This it effects by section 24 (1):—

> "Where notice to quit an agricultural holding or part of an agricultural holding is given to the tenant thereof, and not later than one month from the giving of the notice to quit the tenant serves on the landlord a counter-notice in writing requiring that this subsection shall apply to the notice to quit, then, subject to the provisions of the next following subsection, the notice to quit shall not have effect unless the Minister consents to the operation thereof."

Counternotice by tenant

This subsection leaves a tenant who has received notice to quit with complete freedom of action. He can, if he feels so disposed, comply with the notice and, on quitting, claim the compensation (for disturbance) which is payable to him, as of right, by section 34 of the 1948 Act. If, however, he is minded to avail himself of the protection which the subsection prima facie offers him, then he must (within the time limit imposed) serve on his landlord a counternotice which indicates clearly (*f*) that the tenant desires that the matter shall be put to the arbitrament of the Minister. And if the matter is to be put before the Minister, the party responsible for placing it there is the landlord (*g*), who has one month (*h*) in which to take that step. At the risk of hammering on a nail already driven home it must be emphasised that if the tenant does not give a counternotice, then the notice to quit will take effect in due course; and, conversely, that if the landlord, on receipt of a counter-notice, does not apply for the Minister's consent, then the notice to quit will not take effect.

Minister's consent

If the Minister's consent to the operation of a notice to quit is sought, then, by section 25 (1) of the 1948 Act, he *must* withhold his consent unless he is satisfied that there exists one of the set of circumstances prescribed in paragraphs (a) to (e) of that sub-section; but, even if the Minister is so satisfied, he still has a discretion (given to him by the subsection) to give or withhold his consent (*i*). (It should be added that there is, by subsection (4) of

(*f*) See *Ward* v. *Scott* (*supra*), and *Hammon* v. *Fairbrother*, *ante*.
(*g*) By reg. 2 of the Agriculture (Control of Notices to Quit) Regulations, 1948, S.I. 1948, No. 190.
(*h*) By the same regulation.
(*i*) See *Davies's Case* [1953] 1 All E.R. 1182, and *Grant's Case* [1956] 1 W.L.R. 1240; [1956] 3 All E.R. 321.

the same section, a right of appeal from the Minister to the Agricultural Land Tribunal.)

It will be seen that Parliament has, by enacting section 24 (1) of the 1948 Act, conferred a very valuable and prima facie potent right on every agricultural tenant. But Parliament has also recognised that there may be cases in which the tenant must, in the interests of justice or of the public weal, be prevented from exercising that right. Accordingly there appear in section 24 (1) the words " . . . subject to the provisions of the next following subsection . . . " Subsection (2) states unequivocally that " The foregoing subsection shall not apply " where there exists any of what may, for the sake of brevity, be called the " adverse circumstances " specified in paragraphs (a) to (g) of subsection (2); and subsection (2) also demands that if any " adverse circumstance " exists, then that fact must be stated in the notice to quit.

When consent not required

The wording of the subsection is this: —

" (2) The foregoing subsection shall not apply where—

(a) the Minister has consented under this section to the operation of the notice to quit before the giving thereof and that fact is stated in the notice;

(b) the notice to quit is given on the ground that the land is required for a use, other than for agriculture, for which permission has been granted on an application made under the enactments relating to town and country planning, or for which (otherwise than by virtue of any provision of those enactments) such permission is not required, and that fact is stated in the notice;

(c) the Minister, in pursuance of an application in that behalf made to him in accordance with the following provisions of this Act not more than six months before the giving of the notice to quit, was satisfied in relation to the holding that the tenant was not fulfilling his responsibilities to farm in accordance with the rules of good husbandry, and certified that he was so satisfied, and that fact is stated in the notice;

(d) at the date of the giving of the notice to quit the tenant had failed to comply with a notice in writing served on him by the landlord requiring him within two months from the service of the notice to pay any rent due in respect of the agricultural holding

to which the notice to quit relates, or within a reasonable time or within such reasonable period as was specified in the notice to remedy any breach by the tenant that was capable of being remedied of any term or condition of his tenancy which was not inconsistent with the fulfilment of his responsibilities to farm in accordance with the rules of good husbandry, and it is stated in the notice to quit that it is given by reason of the matter aforesaid;

(e) at the date of the giving of the notice to quit the interest of the landlord in the agricultural holding to which the notice relates had been materially prejudiced by the commission by the tenant of a breach, which was not capable of being remedied, of any term or condition of the tenancy that was not inconsistent with the fulfilment by the tenant of his responsibilities to farm in accordance with the rules of good husbandry, and it is stated in the notice that it is given by reason of the matter aforesaid;

(f) at the date of the giving of the notice to quit the tenant was a person who had become bankrupt or compounded with his creditors, and it is stated in the notice that it is given by reason of the matter aforesaid;

(g) the tenant with whom the contract of tenancy was made had died within three months before the date of the giving of the notice to quit, and it is stated in the notice that it is given by reason of the matter aforesaid " (*j*).

This is not the place in which to essay the construction of these eight paragraphs, but attention may be parenthetically called to a curious difference between paragraphs (a) and (c) on the one hand, and the other paragraphs on the other hand. In paragraphs (a) and (c) all that is required is that the notice to quit shall state that the relevant " adverse circumstance " exists. In each of the other paragraphs, however, the draftsman has provided that the landlord must state in the notice to quit that it is given because the relevant " adverse circumstance " exists; but such a statement would not, strictly, be accurate, for, of course, the landlord gives notice because he wants to determine the contract and to recover possession of his land.

(*j*) This paragraph has been amended by s. 7 of the Agriculture (Miscellaneous Provisions) Act, 1954, thereby overruling *Woodward* v. *Dudley* (*Earl*) (*ante*).

There is one more factor to be mentioned before consideration can be turned onto the tenant's possible dilemma. The draftsman of the 1948 Act has recognised that the terms of section 24 (2) are not to be satisfied "by the mere *ipse dixit* of the landlord" (*k*), and section 26 (1) (a) gives the Minister power to make regulations "for requiring any question arising under subsection (2) of section twenty-four of this Act to be determined by arbitration under this Act," and (significantly) "for extending the period within which a counternotice may be given by the tenant under subsection (1) of that section where any such arbitration is required." This power has in fact been exercised (*l*), but the Court of Appeal has twice shown (*m*) that the relevant regulations are so worded that arbitration is not compulsory, and that the question of whether an alleged "adverse circumstance" in fact obtains can be determined by the courts.

The dilemma

Let it now be supposed that an agricultural tenant has received a notice to quit alleging the existence of one of the "adverse circumstances" prescribed by section 24 (2) of the 1948 Act. If that circumstance in fact obtains, and is described in words which will enable the relevant paragraph to be identified without ambiguity (*n*), the tenant has no right to give a counternotice, and he must, in due course, deliver up possession. Suppose, however, that the tenant is of the opinion that the adverse circumstance does not obtain, or that the relevant paragraph is not clearly referred to; then the tenant has two alternative courses of action: to refer the matter to arbitration, or to keep his objection as a defence in proceedings against him for recovery of possession. If he chooses to have the matter decided by arbitration and the arbitrator finds in favour of the landlord, then the tenant will learn, *ex post facto*, that his right to give a counternotice had been excluded. And if the arbitrator finds in favour of the tenant, then the tenant still has one month (*o*) from the termination of the arbitration in which to give a counternotice. If the tenant decides to raise the question in proceedings against him in the county court, and the landlord is successful in those proceedings, then, again, the tenant will learn *ex post facto* that his right to

(*k*) *Per* Sir Raymond Evershed M.R. in *Jones* v. *Gates* [1954] 1 All E.R. 158, 159.

(*l*) See regs. 4, 5 and 6 of the Agricultural (Control of Notices to Quit) Regulations, 1948, S.I. 1948, No. 190.

(*m*) In *Budge* v. *Hicks* [1951] 2 K.B. 335; [1951] 2 All E.R. 245; and [1951] 2 T.L.R. 349; and in *Jones* v. *Gates* (*ante*).

(*n*) See *Budge* v. *Hicks* (*ante*).

(*o*) See S.I. 1948, No. 190, reg. 6.

give a counternotice had been excluded. But if the landlord is not successful in those proceedings, there is nothing in the 1948 Act or the relevant Regulations which gives the tenant the right to give his counternotice after the proceedings have terminated. This gives rise to this question: if an agricultural tenant is served with a notice to quit which is so phrased as to contain an allegation that his right to give a counternotice under section 24 (1) of the 1948 Act is excluded by the operation of section 24 (2), and if the tenant is of the opinion that the conditions of section 24 (2) are not fulfilled, is it the law that he should, within one month of receiving the notice to quit, serve his counternotice—if, that is, he does not desire the matter to be settled by arbitration? (The question is put in this way because the 1948 Act, in section 24, approaches the problem of security of tenure from the point of view of a tenant. But the question is, of course, equally important for a landlord; and, from his point of view, the question is whether, if a tenant gives such a counternotice, it is the law that the landlord should, within one month, seek the Minister's consent to the operation of the notice to quit?)

The answer to the question must, it is submitted, be sought by examining the way in which the two relevant subsections (which are mutually exclusive) operate; and this examination must be conducted in stages. The first event is that the tenant has received a notice to quit, which, it is to be remembered, remains a notice to quit notwithstanding it gives reasons for its service. The next factor is that the tenant is, by section 24 (1), given the right to give a counternotice, subject only to the provisions of section 24 (2). Section 24 (2) deprives the tenant of that right if, and only if, the conditions which it lays down are fulfilled. If, then, those conditions are not fulfilled, subsection (2) does not come into operation; accordingly, subsection (1) is not negatived, and the tenant's right to give a counternotice is exercisable. But if it becomes known only after the hearing that subsection (2) could not come into operation, it will by then be too late for the tenant to give a counternotice; therefore the notice to quit will have effect, and the tenant will have to comply with it. From this it would seem to follow that if, in the circumstances postulated, the tenant desires to avoid being dispossessed—if his argument at the hearing proves to be sound—then he must give his counternotice within the time limited by section 24 (1).

Cases

There are at least two decisions of the Court of Appeal which appear to support this proposition. The first of these was in

Budge v. *Hicks* (*p*). In that case the notice to quit stated that it was given for certain reasons; the tenant gave a counternotice under section 24 (1), but the landlord did not apply for the Minister's consent. At the hearing in the county court, the judge held that the reasons had been stated (in the notice to quit) sufficiently to satisfy section 24 (2) (e), and it was from that decision that the tenant appealed. The Court of Appeal ruled that the reasons had been stated so ambiguously that paragraph (e) had not been complied with; that, accordingly, the tenant's right to give a counternotice had not been excluded; and that, as the landlord had not obtained the Minister's consent, he was not entitled to possession. But this decision may have been shorn of some of its authority by the decision of the Court of Appeal in *Cowan* v. *Wrayford* (*q*), for in each case Somervell L.J. (as he then was) presided, and in the latter case he said that his judgment in the former case must be read as being based on the *assumption* that the notice to quit was one which required a counternotice (*r*).

The other decision of the Court of Appeal which appears to support the proposition was that in *Jones* v. *Gates* (*s*). The landlord in that case wished to sell the holding in question as a sports ground if he could find a purchaser, but he did not intend to use it himself or to let it for that purpose; further, while he had received some inquiries regarding the land, no one had offered to purchase it. In that state of affairs, he served on the tenant notice to quit and deliver up the holding; and the notice contained this statement: "the land is required for a use other than agriculture for which permission has been granted under the enactments relating to town and country planning." Three days after receiving this notice, the tenant served a counternotice under section 24 (1) of the 1948 Act, but the landlord did not seek the Minister's consent to the notice to quit. The tenant took no further step, and in due course the landlord sued him in the county court for possession. The learned county court judge, on hearing the evidence, held that the landlord had failed to show that the land was "required" for a use other than agriculture within the meaning of section 24 (1) of that Act. From this the landlord appealed, and the appeal was unanimously dismissed. The only reasoned judgment was given by the Master of the Rolls, the other members of the court (Jenkins and Morris L.JJ.) being content to agree with the decision given. Much of the judgment of Sir Raymond Evershed (as he then was) was concerned with

(*p*) *Ante.*
(*q*) [1953] 2 All E.R. 1138.
(*r*) At pp. 1141–1142.
(*s*) [1954] 1 All E.R. 158.

the meaning of the word "required" in section 24 (2) (b), and with the point whether it was compulsory for the tenant, in the circumstances, to proceed to arbitration; and with these points we are not here concerned. He did, however, expressly say (*t*) that in his judgment the learned county court judge rightly concluded the case in giving judgment for the tenant. And the Master of the Rolls made certain significant statements. After he had briefly stated the facts, and had read the notice to quit, he read section 24 (1) of the 1948 Act; he then said this (*u*):

> "I pause to emphasise that Parliament has there enacted in the plainest terms that, where a cross-notice is given within a month, then, subject only to what follows in the next subsection, the notice to quit is not to have effect unless the Minister consents."

And he repeated this later (*a*):

> "A second preliminary observation which I would like to make is that section 24 (1) of the Act of 1948 makes it abundantly plain that in the circumstances mentioned in the section a landlord is not entitled to serve an effective notice against a tenant of an agricultural holding without the Minister's consent, save in cases in which one or other of the provisions of section 24 (2) are shown to be satisfied. Prima facie, therefore, it is for a landlord, if he desires to obtain an order for ejectment, to show that section 24 (1) is excluded."

Support for the proposition which has been made is also to be found in three other cases, but as each of them was the judgment of a court of first instance, and as authority of the Court of Appeal is available, they need not be discussed very fully. Indeed, the first, the decision of Oliver J., in *Leicestershire County Council* v. *Winterburn* (*b*), cannot be discussed fully, for the report of the judgment is elliptical. But from what is stated it is clear that the plaintiffs gave to the defendant a notice to quit, which was intended to pray in aid section 24 (2) (d) of the 1948 Act but failed to comply with the requirements of that paragraph; and the defendant did not give a counternotice. The learned judge held that, notwithstanding the notice to quit did not satisfy paragraph (d), that did not vitiate it as a notice to quit, and he gave judgment for possession for the plaintiffs. It may be that little reliance should be placed on this decision because of the inadequacy of the report; but the next case, *Lawes* v. *Caulcutt* (*c*), is fully

(*t*) *Ibid.*, at 162. (*u*) *Ibid.*, at 159.
(*a*) *Ibid.*, at 160.
(*b*) (1951) 157 E.G. 473; (1951) 157 E.G.D. 14.
(*c*) [1952] 2 Q.B. 834; [1952] 1 All E.R. 748; and [1952] 1 T.L.R. 757.

reported. In that case the issue between the parties was, in its essence, this: the plaintiff maintained that she was a "landlord" within section 24 (3) (a) of the 1948 Act, and that as the opening words of that subsection expressly excluded subsections (1) and (2) from the special tenancies to which subsection (3) applied, no question of Ministerial consent to a notice to quit could apply. The defendant's retort was that, on the facts, the plaintiff was not such a "landlord"; that subsection (3) was, therefore, inapplicable; and that the notice to quit given by the plaintiff could not be effective without the Minister's consent under subsection (1). The defendant had served a counternotice, but the plaintiff had not sought the Minister's consent. Gorman J. held (*d*) that, on the facts, the plaintiff

> "did not fulfil the requirements of section 24 (3) (a) and that, therefore, the notice to quit was one to which section 24 (1) applied, and the consent of the Minister to its operation was required. That consent not having been obtained the notice was, accordingly, bad."

The third decision was that of Danckwerts J. in *Woodward* v. *Dudley* (*Earl*) (*e*). The circumstances of the decision were slightly unusual in that it was given in answer to an originating summons issued by the plaintiff, asking for a declaration that a notice to quit served on him was invalid. The plaintiff's objection to the notice to quit, to which he had given a counternotice, was twofold: that the notice to quit referred to part only of the holding, whereas the defendant (the landlord) sought to recover the whole of the land, and that the notice failed in its attempt to invoke section 24 (2) (g) of the 1948 Act. Danckwerts J. found that the plaintiff's first objection was sound, and that was, of course, sufficient to dispose of the matter. The learned judge also dealt, however, with the plaintiff's second objection, and found that that, too, was sound, and he said (*f*):

> "In the absence, therefore, of the consent of the Minister, the landlord is unable to succeed on this point on the construction of the words of the statute. Accordingly, I am of opinion that the application by the tenant is successful."

In upholding the plaintiff's second objection, Danckwerts J. ruled that paragraph (g) of section 24 (2) of the 1948 Act did not, in its original form, cover cases where agricultural land was let to joint

(*d*) See the headnote in [1952] 2 Q.B. 832, where the *ratio* is succinctly stated.

(*e*) [1954] Ch. 283; [1954] 1 All E.R. 559.

(*f*) [1954] Ch. at p. 290; substantially the same words are used in [1954] 1 All E.R. at p. 562.

tenants. This construction of the paragraph is no longer good law, as a result of the Agriculture (Miscellaneous Provisions) Act, 1954, s. 7; but that does not alter the *ratio decidendi* of this particular point.

Cowan v. *Wrayford*

There is only one other authority to consider, and that is the decision in *Cowan* v. *Wrayford*, in which the Court of Appeal approached the problem in quite a different manner; the only full report of the case is in [1953] 2 All E.R. 1138. The landlord in that case sought to pray in aid section 24 (2) (d) of the 1948 Act, but, before turning to the decision, a few words must be said about an agricultural tenant's right to compensation for disturbance. Section 34 (1) of the 1948 Act provides that if an agricultural tenancy terminates by reason of a notice to quit given by the landlord, and in consequence of that notice the tenant quits the holding, then compensation shall be payable by the landlord to the tenant in the manner laid down by the section; but section 31 (1) goes on to provide that such compensation shall not be payable if the operation of section 24 (1) of the Act has been excluded by virtue of, *inter alia*, section 24 (2) (d).

To turn now to the facts in *Cowan* v. *Wrayford* (*ante*). The plaintiff was the landlord and the defendant was the tenant of agricultural land to which the 1948 Act applied. By a notice in writing dated September 29, 1951, the landlord required the tenant to remedy, by December 21, 1952, certain defects specified in the notice. On December 22, 1951, the landlord served on the tenant a notice in these terms:

> " Notice to quit by landlord to tenant stating reasons under section 24 (2) of the Agricultural Holdings Act, 1948. I, the undersigned, hereby give you notice to quit and deliver up on December 25, 1952, possession of the holding known as . . . This notice is given for the following reasons: That you have failed to remedy the breaches of your tenancy agreement as set out in a notice served on you on September 29, 1951, *viz.*, . . . "

The tenant remained in possession, and in 1953 the landlord commenced an action for possession, in which he relied on the notice of December 22, 1951, as terminating the tenancy. The tenant admitted the notices, but alleged in his defence that

> " . . . the said tenancy has not been effectually determined, for while the defendant admits the receipt of the purported notice to quit (hereinafter called ' the second notice ') it alleges

failure to comply with the first notice (of September 29, 1951) and was expressed to take effect during the period allowed to the defendant to carry out the said works required by the first notice and there was, therefore, at the time of the second notice no ground as required by section 24 (2) (d) (of the Act of 1948) entitling the plaintiff to serve the same."

(Here it is permissible to observe that the pleader's reasoning was, with respect, not sound. The landlord was entitled to serve a notice to quit by common law, and not by section 24 (2) (d) of the 1948 Act.) The landlord contended that, if the notice to quit were inoperative under section 24 (2) of the Act, it should operate under section 24 (1), and, as the tenant had not served a counter-notice as provided by section 24 (1), he (the landlord) was entitled to possession without the Minister's consent. (And here it may be observed that a notice to quit does not operate under section 24 (1) of the Act; it operates, if at all, by virtue of common law unless section 24 (1) is invoked to render it of no effect.) The county court judge held that the notice of December 22, 1951, was not a valid notice to quit, and that the landlord, having elected to proceed under section 24 (2), could not later proceed under section 24 (1).

From that decision the tenant appealed, and the finding of the Court of Appeal, as summarised in the headnote, was this: at the date when the notice to quit was served the time specified in the notice to remedy had not elapsed, and, therefore, the conditions laid down in section 24 (2) (d) had not been fulfilled, and the notice could not operate as a valid notice under section 24 (2); the landlord, having elected to proceed under section 24 (2), and, the notice not being a clear and ambiguous notice that, if he wished to rely on it in the alternative as having been given under section 24 (1), should he fail under section 24 (2), could not rely on the notice as a general notice under section 24 (1), it being essential for him to let the tenant know clearly under which subsection he was proceeding; and, therefore, he was not entitled to possession.

The headnote accurately summarises the finding of the whole court, but it is difficult from the three judgments to find the basis on which each member of the court came to his decision. Somervell L.J. (as he then was) drew attention to the provisions of section 34 (1) of the 1948 Act which exclude the tenant's right to compensation if section 24 (2) (d) is successfully invoked, and suggested (at pp. 1139–1140 of the report) that there is a difference in procedure according as the landlord is, or is not, proceeding "under" section 24 (2) (d). In one sense, of course, a landlord who seeks to invoke that subsection is proceeding "under" it;

but, as has already been said, he does not give notice to quit under the subsection. His Lordship continued by stating the facts, and by pointing out that it could not be suggested that the notice to quit was "within the terms of section 24 (2) (d)." His Lordship went on to refer to the common law rule that a notice to quit must be clear and unambiguous; and he suggested that what had happened here was that the tenant, on receiving the "remedy" notice, concluded that the landlord intended to

> "bring about a termination if, but only if, [the tenant] did in fact fail to remedy in the time which the earlier notice had specified. It was not suggested that if that was, as I think it was, a natural interpretation it would be a clear, unambiguous and valid notice to quit. It would, I think, probably fall under the principle which says notices to quit must not be conditional."

This, it is submitted with respect, is the rational ground on which the decision can be justified.

However, Somervell L.J. went on to deal with the point at large, and gave it as his opinion that a notice to quit purporting to be given "under" section 24 (2) could not be relied on, alternatively, as a general notice to quit to which section 24 (1) applied. And he suggested (at p. 1141) that to get over the difficulty the landlord should state, in the notice, that he would rely on section 24 (2) or, if he failed on that, that he would rely on the notice as a "general common law unqualified notice," or that the landlord should serve two notices. The comment such a suggestion invites is that, if it were followed, surely the landlord would be doing the one thing which would make it impossible for the tenant to know what was expected of him.

It is very difficult, with respect, to understand Denning L.J.'s reasoning. It would, however, seem that in his opinion section 24 has obliterated the script of the common law, and that a landlord must proceed either under subsection (1) or under subsection (2), and must make it clear which subsection he has selected. Indeed, his Lordship said (at p. 1142):

> "In order that a notice to quit an agricultural holding should be good, it must be clear and unambiguous, and for that purpose it must either be a simple notice without stating reasons at all, in which case it will operate under section 24 (1), or it must be a notice stating reasons as prescribed by subsection (2), in which case it will operate under subsection (2)."

It is suggested, respectfully, that this statement is too extreme (*g*). Further, the fact remains that the 1948 Act does not require the landlord to select one or other of the two subsections. The Act does not interfere with, or qualify, a landlord's right to give a notice to quit: what it does is to furnish a tenant who receives such a notice with means of rendering it of no effect, except in certain cases.

The last judgment was given by Romer L.J., who would appear to have formed two different *rationes*. At the beginning of his judgment he says (at p. 1143):

> "I think, however, that prima facie if a lessor elects to proceed in a particular way which gives rise to particular rights in the tenant he cannot, if he fails, treat his notice as founded on a different approach which would have dictated a different course of action by the tenant."

With respect, however, it may be observed that if the tenant chooses (as he is entitled to do) to contest the landlord's claim (that an "adverse circumstance" exists) in the courts, it is not until after the hearing that he will know whether he ought to have given a counternotice; he has, nevertheless, been served with notice to quit, which remains what it says it is. Romer L.J. then proceeds thus:

> "It is certain that an unsuccessful notice under subsection (2) cannot automatically be converted, when it fails, into a general notice to quit, and indeed, if it could be, considerable hardship might be inflicted on the landlord, who might be only desirous of getting the tenant out provided he got him out in such circumstances that he would not have to pay compensation. He might not desire to get him out by determining the tenancy by a general or ordinary notice to quit, which would involve the payment of compensation."

At the risk of monotonous repetition it must again be pointed out that a landlord who gives notice to quit does so under his common law right so to do. If he tries, but fails, to establish that section 24 (2) has excluded the tenant's right (under section 24 (1)) to give a counternotice, that does not alter the fact that notice to quit has been given, and no conversion is necessary. The potential financial disadvantage to the landlord, should he fail to invoke section 24 (2), is an undoubted fact; but the answer to that is that if the landlord wishes to avoid paying compensation,

(*g*) See the comment of Cassels J. in *Hammon* v. *Fairbrother* [1956] 2 All E.R. 108 at p. 111. That decision has some connection with the problem under review, but is not discussed because the landlord did not, in giving notice to quit, purport to invoke section 24 (2) of the 1948 Act.

he should take steps to ensure that he does invoke section 24 (2) successfully.

The other *ratio* which found favour with Romer L.J. was that, in any event, the notice to quit failed because of ambiguity.

> "At the lowest," said his Lordship (at p. 1143), "the document would, I think, give rise in this connection to ambiguity as to the lessor's intention, and it is well established that notices to quit must be plain and unequivocal. Further, I think the notice to quit offended the principle of certainty as to its meaning in another way, because it had to be construed in the light of all relevant surrounding circumstances, and one of the circumstances was the service of the notice to remedy and the terms on which that notice had been expressed. That notice gave until December 21, 1952, to do the work which was specified in the notice. There was no reason why the tenant should think a mistake had been made, and indeed it was suggested with some force in argument that . . . the document could fairly be taken to mean what it said. That first notice was never cancelled; and a little while afterwards the notice to quit arrived. Accordingly, the tenant might well think, as in fact he did think, that it merely meant that unless he complied with the notice to remedy, he would have to go. Accordingly, I agree that the notice to quit gave rise to an ambiguity in that sense also and cannot be treated as a good and valid notice."

There is a plain suggestion here that Romer L.J. thought, with Somervell L.J., that the notice to quit was conditional and, therefore, bad. It has already been submitted that this is the real ground on which the decision rests. If that submission is sound, then *Cowan* v. *Wrayford* (*ante*) does nothing to qualify the authority of the other relevant decisions which have been discussed above, and the proposition which has been made in this article is established.

PROTECTIVE TRUSTS

By Professor L. A. Sheridan, ph.d., ll.b., Barrister-at-Law

Protective trusts are the best English and Irish law can do for the restraint of spendthrifts. Restraints on anticipation, after a protracted and gallant rearguard action, have given up the ghost. The inalienable life interest, used in some of the United States, is not allowed. Inalienability of any vested interest is one of the minor devils offering temptation to the tortuous soul of the conveyancer. Revulsion from it is a healthy reaction to be inculcated in the young, and the view of the establishment is now uncompromisingly that a life interest may be trammelled in no fashion impossible for a fee simple or absolute ownership. Accordingly, the testator who thinks he knows better than the legatee what's good for the legatee, and who yet considers the legatee more deserving than his creditors for value, has had to put up with the protective trust. The beneficiary gets a determinable life interest, and then alternative provisions follow. The commonest form is a life interest determinable on alienation, incumbrance or bankruptcy, followed by a power of appointment (of the kind usually called a discretionary trust) in favour of the ex-tenant for life, either alone, or along with other members of his family.

The discretionary trust which constitutes part of the machinery of the protective trust is the same as any other special power of appointment vested in trustees (*a*). The determinable life interest is like any other determinable life interest. Yet there are special features of protective trusts.

Keeping the Wolf from the Door

Just as you cannot have an inalienable life interest, so there cannot be one which continues vested in a bankrupt despite his bankruptcy (*b*). Yet a limitation which brings a remainderman or reversioner into possession on the prior tenant's bankruptcy is tolerated. Bacon C.J., when he sat in the Bankruptcy Court, seems to have encouraged the defeat of creditors by this method. In the words of Lord Eldon in *Brandon* v. *Robinson* (*c*)—

> "There is no doubt, that property may be given to a man, until he shall become bankrupt. It is equally clear, generally

(*a*) For a recent examination of discretionary trusts, see *ante*, p. 55.

(*b*) See, *e.g.*, *Graves* v. *Dolphin* (1826) 1 Sim. 66 (Leach V.-C.); *Rochford* v. *Hackman* (1852) 9 Hare 475 (Turner V.-C.).

(*c*) (1811) 18 Ves. 429, 433–434.

> speaking, that if property is given to a man for his life, the donor cannot take away the incidents to a life estate; and, as I have observed, a disposition to a man, until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give to him for his life, with a proviso that he shall not sell or alien it. If that condition is so expressed as to amount to a limitation, reducing the interest short of a life estate, neither the man nor his assignees can have it beyond the period limited."

So one can limit property to another until bankruptcy (or whatever else you expect him to do), or to another for life, with a shifting clause to operate on his bankruptcy (or whatever) (*d*). It is nonetheless a valid disposition when the donor is the wife of the donee (or vice versa, presumably, though husbands do not seem so generous or wives so bankrupt, at least in the law reports). Nor is there any invalidity merely because a purchaser settles property he has just bought on protective trusts in favour of the vendor. In each case, some actual intention to defeat or delay creditors must be proved before they can avoid the transaction. Thus, in *Ex parte Eyre* (*e*) A bought property from his insolvent son B for its full value, and then settled it so as to give B a life interest determinable on bankruptcy. When B later did go bankrupt, Bacon C.J. held that his interest had determined—*i.e.*, did not vest in his assignee in bankruptcy—in the absence of any external evidence of an intent to defraud.

All the decisions upholding this type of defeasance or shifting clause have been concerned with life estates. In *Re Machu* (*f*) Chitty J. held that a condition for shifting on bankruptcy could not be annexed to a fee simple. The learned judge left open the question of whether such an estate or equitable interest could be limited so as to be determinable on bankruptcy. The distinction

(*d*) *Dommett* v. *Bedford* (1796) 3 Ves. 149, 6 T.R. 684 (Arden M.R.); *Ex p. Hinton* (1808) 14 Ves. 598 (Lord Eldon); *Brandon* v. *Robinson* (1811) 18 Ves. 429; *Rippon* v. *Norton* (1839) 2 Beav. 63 (Lord Langdale M.R.); *Godden* v. *Crowhurst* (1842) 10 Sim. 642 (Shadwell V.-C.); *Rochford* v. *Hackman* (1852) 9 Hare 475; *Wallace* v. *Anderson* (1853) 16 Beav. 533 (Romilly M.R.); *Joel* v. *Mills* (1857) 3 K. & J. 458 (Page Wood V.-C.); *Montefiore* v. *Behrens* (1865) L.R. 1 Eq. 171 (Lord Romilly M.R.); *Re Bullock* (1891) 64 L.T. 736 (Kekewich J.); *Mackintosh* v. *Pogose* [1895] 1 Ch. 505 (Stirling J.). And see *Shee* v. *Hale* (1807) 13 Ves. 404 (Grant M.R.); *R.* v. *Robinson* (1811) Wight. 386 (MacDonald C.B.); *Wilkinson* v. *Wilkinson* (1815) G.Coop. 259 (Grant M.R.); *Wilkinson* v. *Wilkinson* (1819) 3 Swans. 515 (Plumer M.R.); *Cooper* v. *Wyatt* (1821) 5 Madd. 482 (Leach V.-C.); *Lear* v. *Leggett* (1830) 1 Russ. & M. 690 (Lord Lyndhurst); *Lewes* v. *Lewes* (1833) 6 Sim. 304 (Lord Lyndhurst); *Whitfield* v. *Prickett* (1838) 2 Keen 608 (Lord Langdale M.R.); *Pym* v. *Lockyer* (1841) 12 Sim. 394 (Shadwell V.-C.); *Brandon* v. *Aston* (1843) 2 Y. & C.C.C. 24 (Knight Bruce V.-C.); *Re Winwood's Settlement* (1916) 114 L.T. 1095 (Eve J.); *Re Wombwell* (1921) 125 L.T. 437 (Horridge J.).

(*e*) (1881) 44 L.T. 922. *Cf. Ex p. Mackay* (1873) L.R. 8 Ch.App. 643.

(*f*) (1882) 21 Ch.D. 838.

seems to be technical. If the bankruptcy is bound to occur, if at all, within the perpetuity period (in jurisdictions where rights of entry and possibilities of reverter are subject to the rule against perpetuities), and if clauses for defeasance on bankruptcy are permitted at all, there seems to be no policy against allowing the annexation of such clauses to any type of property.

No Man His Own Wolfherd

In general, a person cannot settle his own property on himself in such a way as to prevent it vesting in his assignee in bankruptcy (*g*). In *Whitmore* v. *Mason* (*h*), Page Wood V.-C. held void as against creditors a provision in a partnership deed that on the bankruptcy of a partner, his share should go over to the other partners.

Property owners are entitled to settle property on themselves for life with remainders over. When it is said that a man cannot settle his own property on himself so as to render it immune from creditors it does not mean that the settlement is abortive. What happens is that the provision for determination on bankruptcy is ignored as against the generality of creditors. In the ordinary case of a life interest determinable on bankruptcy, alienation or otherwise ceasing to be entitled to receive payment, when the tenant for life cum settlor goes bankrupt an interest for his life vests in his assignee in bankruptcy. *Quoad* the creditors, the life interest has ceased to be determinable. Thus, if another determining event happens, *e.g.*, a second bankruptcy, that does not end the interest of the assignee in the first bankruptcy (*i*). But the forfeiture clause remains valid as against the bankrupt: on his discharge, if there is anything left of the life interest, it will go over on the trusts limited to follow forfeiture. Similarly, if a determining event other than bankruptcy occurs first, the life interest will shift. In that event, if the settlor subsequently goes bankrupt, there is nothing for the creditors out of the settlement.

(*g*) *Re Meaghan* (1803) 1 Sch. & L. 179 (Lord Redesdale); *Ex parte Cooke* (1803) 8 Ves. 353 (Lord Eldon); *Higginson* v. *Kelly* (1810) 1 Ba. & B. 252 (Lord Manners); *Higginbotham* v. *Holme* (1812) 19 Ves. 88 (Lord Eldon); *Ex parte Hodgson* (1812) 19 Ves. 206 (Lord Eldon); *Ex parte Young* (1818) 3 Madd. 124 (Leach V.-C.); *Lester* v. *Garland* (1832) 5 Sim. 205 (Shadwell V.-C.); *Ex parte Jay* (1880) 14 Ch.D. 19 (Court of Appeal); *Re Burroughs Fowler* [1916] 2 Ch. 251 (Peterson J.). And see *Ex parte Oxley* (1807) 1 Ba. & B. 257 (Lord Manners); *Ex parte Brenchley* (1826) 2 Gl. & J. 174 (Vice-Chancellor); *Ex parte Mackay* (1873) L.R. 8 Ch.App. 643; *Re Pearson* (1876) 3 Ch.D. 807 (Bacon C.J.B.); *Re Brewer's Settlement* [1896] 2 Ch. 503 (Chitty J.); *Re Holland* [1902] 2 Ch. 360 (Court of Appeal); *Re Winwood's Settlement* (1916) 114 L.T. 1095; *Re Wombwell* (1921) 125 L.T. 437. *Cf. Re Johnson* [1904] 1 K.B. 134 (Phillimore J.).

(*h*) (1861) 2 J. & H. 204. And see *Wilson* v. *Greenwood* (1818) 1 Swans. 471 (Lord Eldon).

(*i*) *Re Burroughs-Fowler* [1916] 2 Ch. 251.

It is only when a bankruptcy occurs while the tenant for life is entitled that the forfeiture clause can be attacked (*j*). In *Re Detmold* (*k*) North J. held a single creditor (as opposed to creditors generally) unable to stop the defeasance. The learned judge said (*l*)—

> "A settlement by a man of his own property upon himself for life, with a clause forfeiting his interest in the event of alienation, or attempted alienation, has never, so far as I know, been defeated in favour of a particular alienee; it has only been defeated in favour of the settlor's creditors generally, on the ground that it would be a fraud on the bankrupt law."

Of course, if the settlement is made with intent to defraud creditors, the whole of the trusts can be avoided by the assignee in bankruptcy (*m*).

In *Phipps* v. *Lord Ennismore* (*n*) Lord Lyndhurst held void an attempt by a man to settle property on himself so that it would not pass to a subsequent purchaser. It is, however, not a general doctrine that a clause of forfeiture on alienation is void as against an alienee merely because the tenant for life is the settlor. In *Phipps* v. *Lord Ennismore* the restriction on disposition was contained in a separate document from that granting the life interest, and would not have come to the notice of a reasonable purchaser. The decision is an application of the general principle against dispositions in fraud of subsequent purchasers (*o*).

There is one case where a settlor can give himself a life interest subject to such a provision for determination on bankruptcy as will carry the interest (on bankruptcy) to the remainderman and not the creditors. That is to the extent to which the settled property is equal in value to consideration received from the remainderman. The typical case (doubtless not as common as in the good old days) is that where, on marriage, the husband settles property on himself for life until bankruptcy, with remainder on his death or bankruptcy to the wife and/or her relations. Such property will escape the husband's creditors as to an amount equal to the contribution of the wife, provided her contribution is not settled on the same conditions. In *Re*

(*j*) See *Brooke* v. *Pearson* (1859) 27 Beav. 181 (Romilly M.R.); *Knight* v. *Browne* (1861) 7 Jur.(N.S.) 894 (Page Wood V.-C.); *Re Detmold* (1889) 40 Ch.D. 585.
(*k*) (1889) 40 Ch.D. 585.
(*l*) 40 Ch.D. 587–588.
(*m*) *Re Pearson* (1876) 3 Ch.D. 807.
(*n*) (1829) 4 Russ. 131.
(*o*) *Knight* v. *Browne* (1861) 7 Jur.(N.S.) 894.

Meaghan (*p*) under a marriage settlement £600 was paid by the wife to the husband on the latter giving his bond for £1,000 to a trustee on trust for himself for life until insolvency, then to such persons as the wife should appoint. The husband went bankrupt, and the trustee proved for £1,000. On an application to have the proof expunged, Lord Redesdale held it valid as to £600.

Legislation

In an effort to shorten settlements by transferring their provisions to a central location, the Trustee Act, 1925, s. 33 (*q*), provides—

> (1) Where any income, including an annuity or other periodical income payment, is directed to be held on protective trusts for the benefit of any person (in this section called "the principal beneficiary") for the period of his life or for any less period, then, during that period (in this section called the "trust period") the said income shall, without prejudice to any prior interest, be held on the following trusts, namely:—
>
> (i) Upon trust for the principal beneficiary during the trust period or until he, whether before or after the termination of any prior interest, does or attempts to do or suffers any act or thing, or until any event happens, other than an advance under any statutory or express power, whereby, if the said income were payable during the trust period to the principal beneficiary absolutely during that period, he would be deprived of the right to receive the same or any part thereof, in any of which cases, as well as on the termination of the trust period, whichever first happens, this trust of the said income shall fail or determine;
>
> (ii) If the trust aforesaid fails or determines during the subsistence of the trust period, then, during the residue of that period, the said income shall be held upon trust for the application thereof for the maintenance or support, or otherwise for the benefit, of all or any one or more exclusively of the other or others of the following persons (that is to say)—

(*p*) (1803) 1 Sch. & L. 179. Other such cases are *Ex parte Cooke* (1803) 8 Ves. 353; *Higginson* v. *Kelly* (1810) 1 Ba. & B. 252; *Ex parte Hodgson* (1812) 19 Ves. 206; *Ex parte Young* (1818) 3 Madd. 124; *Lester* v. *Garland* (1832) 5 Sim. 205. And see *Ex parte Verner* (1808) 1 Ba. & B. 260 (Lord Manners); *Re Holland* [1902] 2 Ch. 360.

(*q*) Comparative legislation: (i) Ireland: none; (ii) Federation of Malaya: Trustee Ordinance, 1949 (No. 66), s. 35; (iii) Singapore: Trustee Ordinance (1955 revised ed., c. 34), s. 35.

(a) the principal beneficiary (*r*) and his or her wife or husband, if any, and his or her children or more remote issue, if any; or

(b) if there is no wife or husband or issue of the principal beneficiary in existence, the principal beneficiary and the persons who would, if he were actually dead, be entitled to the trust property or the income thereof or to the annuity fund, if any, or arrears of the annuity, as the case may be;

as the trustees in their absolute discretion, without being liable to account for the exercise of such discretion, think fit.

(2) This section does not apply to trusts coming into operation before the commencement of this Act, and has effect subject to any variation of the implied trusts aforesaid contained in the instrument creating the trust.

(3) Nothing in this section operates to validate any trust which would, if contained in the instrument creating the trust, be liable to be set aside.

"*On protective trusts*"

Section 33 comes into operation when income is directed to be held on protective trusts. This may be directed either (a) by setting out limitations which in fact constitute protective trusts as that expression is commonly used by conveyancers (there is no statutory definition), or by expressing the income to be given "on protective trusts." That is not to say that a grant "to A on protective trusts" will bring in section 33. Prima facie that is as void for uncertainty in England now as it was before 1926. In *Re Wittke* (*s*), the testator gave his residue

> "(a) as to the income thereof upon protective trusts for benefit of my sister [naming her] provided always that my trustees shall have power from time to time to pay to my said sister the whole or any part of the capital of my residuary estate in their absolute discretion and subject thereto (b) upon trust to pay the capital and income of my residuary estate to King Edward's Hospital Fund for London. . . ."

Vaisey J. held that section 33 applied only after deciding that as a matter of construction the sister was given a life interest.

(*r*) Income may be applied for the maintenance and support of the principal beneficiary even if he is indebted to the estate: *Re Eiser's Will Trusts* [1937] 1 All E.R. 244 (Bennett J.).

(*s*) [1944] Ch. 166. See also *Re Isaacs* (1948) 92 S.J. 336 (Judge Peel, Deputy of the Chancellor, Lancaster).

"*Absolute discretion*"

Simonds J. considered the obligation of the trustees under section 33 (1) (ii) in *Re Gourju's Will Trusts* (*t*). He said (*u*)—

> ". . . I come to the conclusion that the obligation of the trustees is to apply the trust income as and when they receive it for the purposes indicated in the subsection, with, of course, such necessary limitations on absolute obligation as the practical necessities of the case demand. Putting it in a negative way, they are not entitled, regardless of the needs of the beneficiaries, to retain in their hands the income of the trust estate."

Put in Simonds J.'s second ("negative") way, this attitude seems consonant with the intention of the section. But if the trustees do not have regard to the needs of the beneficiaries, what is to be done about it? Section 33 says ". . . as the trustees in their absolute discretion, without being liable to account for the exercise of such discretion, think fit." This appears to leave no method of proceeding against recalcitrant trustees other than the drastic one of seeking their removal. The court seemingly cannot exercise the power if the trustees fail to do so; yet an equitable duty with no method of enforcement is the rare animal whose existence Roxburgh J. declined to bless in *Re Astor's Settlement Trusts* (*v*).

(*t*) [1943] Ch. 24.
(*u*) [1943] Ch. 34.
(*v*) [1952] Ch. 534.

RETIREMENT ANNUITIES FOR THE SELF-EMPLOYED

A review of the contracts available to solicitors prepared by the Life and Pensions Department of Messrs. Price, Forbes & Co., Ltd., Incorporated Insurance Brokers, London.

With the publication of the Law Society's Retirement Benefits Scheme, solicitors are now in a position, within the limits of the Scheme, to choose the retirement annuity contract which they feel will be most advantageous for their own particular circumstances. In the main, the Law Society's Scheme affords two definite features, as follows:—

(a) Definite options of annuities at each of the permissible retirement ages are incorporated in the contract. It is obviously quite impossible for the average practising solicitor to select a retirement date many years in advance and thus the varying options are of great importance.

(b) Relevant earnings will vary each year with consequent effect on the amount of qualifying premium which can be paid. Thus, it is important to ensure that the contract will permit fluctuating premiums throughout its term.

Both of the above features are desirable and, in fact, should be considered essential.

Whilst the Law Society's Scheme offers attractive rates, many solicitors have expressed the opinion that it is severely limited in that no provision is made for With Profits contracts which, in their view, constitute a "hedge" against inflation or for a reversionary annuity to a widow.

With Profits Contracts

Dealing first with the question of With Profits contracts, it is of interest to study representative figures of assurance offices particularly noted for their With Profits policies. In considering the merits of the various offices the solicitor should bear in mind the method by which the bonuses are added to the retirement annuity contract. Some offices declare bonuses at the rate applicable only to profits earned by the retirement annuity contracts as a whole. While this may be an equitable arrangement, adverse experience with regard to longevity of the annuitants might bear hardly on the bonus distributions. The selection of an office, which has specialised in pensions business might, however,

minimise the risk. On the other hand, many offices intend to declare profits for retirement annuities based on the profits of both life and annuity funds. This second class may usually be identified by the method employed for estimating future bonus additions on the contracts they issue. Normally their bonus estimates assume a continuation of the present rate of interim bonus which is being paid in respect of other classes of business.

Reversionary Annuities to Dependants

There is one other form of contract which has already been mentioned as not available under the Law Society's Scheme, *i.e.*, the retirement annuity contract combining a reversionary annuity for the benefit of a dependant. This may interest those solicitors with family responsibilities who are prepared to forgo part of their pension rights in order to make provision for a dependant. Usually it takes the form of providing a pension to the wife in the event of the husband's predeceasing her whenever that may be, either before or after pension age, and a contract is issued on either With or Without Profits bases. The most general form is that under which premiums are not returned in any circumstances although it is possible to obtain contracts under which, if the wife predeceases her husband who also dies before pension age, then part of the premiums are returned, usually with compound interest. Each separate contract varies greatly and it is impossible to summarise the varied benefits to any purpose.

Annual Premium Contracts

Representative examples of the benefits obtainable under annual premium contracts are given in Tables 1A and 1B. It will be observed that the only differences between the conditions of these two tables is that in Table 1A premiums are returnable *without* interest in the event of death before pensionable age, whereas in Table 1B the premiums are returnable *with* interest (*a*).

Single Premium Contracts

Annual premium contracts presuppose a confidence from the pensioner that he will always be able to afford the fixed annual outgoings provided. This is quite a reasonable assumption perhaps, if the outlay is modest, but if the premium should be close to the maximum permitted under the Act or if income is subject to great fluctuation, then some form of premium fluctuation must be introduced into the retirement annuity contract. This

(*a*) See Tables 3A and 3B for corresponding examples of benefits offered by certain offices.—*Editor.*

is best arranged by single premium contracts under which the benefit will vary each year, gradually decreasing as age increases. Representative examples of benefits obtainable are given in Table 2 (*b*).

The schemes presently issued by offices under this plan have the main advantage that a varying premium each year may be paid to suit the individual's circumstances at the time but it should be borne in mind that the rates are generally not guaranteed in advance and consequently, may harden against the purchaser in the future. It would be desirable, therefore, to secure at least part of the benefit at a rate which is guaranteed for all future years. The balance of the required benefit may be secured by a non-guaranteed rate if this at the appropriate date shows an improvement on the guaranteed rate. For future years advantage of the guaranteed rate will only be taken when it proves to be more favourable than the best market rate then current. This system provides the greatest measure of flexibility.

Return of Premiums with Interest

A word should be said regarding the return of premiums plus interest indicated in the contracts mentioned above. Interest return *ipso facto* must reduce the available retirement annuity at retirement and the higher the interest rate, the greater the reduction of annuity. This is, after all, a retirement annuity and the ultimate object in most cases must be the provision of the highest possible annuity. Interest return, and indeed, premium return, will increase the estate duty problem, in that both premiums and interest aggregate with the deceased's main estate for the purposes of estate duty. The wise solicitor may feel that this problem must be considered against the background of his personal insurance arrangements and additional life assurance cover may be required, perhaps in conjunction with a Married Women's Property Act policy. On the other hand, in exceptional cases where there is a possibility that substantial death duties may be incurred, it may be wise to effect a contract which provides that there shall be no return of premium whatsoever in the event of death before pension age, but this type of contract cannot be recommended as a general rule.

N.B.—Tables 1 and 2 have been prepared from the rates of leading With Profits offices and are, of course, subject to alteration from time to time.

(*b*) See Table 4 for corresponding examples of benefits offered by certain offices. —*Editor.*

With Profits Deferred Annuities, commencing at age 65

TABLE 1

Pensions secured by £100 Annual Premium

A. Premiums returned *without* interest in the event of death before pension age.

Age next birthday:

	35		*42*		*50*		
Office	Guaranteed Pension £	Estimated Pension £	Guaranteed Pension £	Estimated Pension £	Guaranteed Pension £	Estimated Pension £	Bonus rate assumed per £100 Pension
A.	407	631	279	390	161	201	30/0 compound.
B.	385	644	267	405	158	211	45/0 simple.
C.	415	601	287	386	165	202	30/0 simple.
D.	355	628	251	390	151	201	40/0 compound.

B. Premiums returned *with* interest in the event of death before pension age.

Age next birthday:

	35		42		50			
Office	Guaranteed Pension £	Estimated Pension £	Guaranteed Pension £	Estimated Pension £	Guaranteed Pension £	Estimated Pension £	Bonus rate assumed per £100 Pension	Interest Return
A.	380	590	266	373	158	196	30/0 compound.	4% compound.
B.	358	599	253	384	153	205	45/0 simple.	3½% compound.
C.	312	584	229	370	143	195	44/0 compound.	3½% compound.

TABLE 2

Pensions secured in the 1st year by £100 Single Premium

In the event of death before pension age, premiums are returned with or without compound interest as stated.

Age next birthday:

Office	35 Guaranteed Pension £ s. d.	35 Estimated Pension £ s. d.	42 Guaranteed Pension £ s. d.	42 Estimated Pension £ s. d.	50 Guaranteed Pension £ s. d.	50 Estimated Pension £ s. d.	Bonus rate assumed	Interest Return
A.	21 14 0	33 14 0	17 10 0	24 10 0	13 16 0	17 2 0	30/0 compound.	4% compound.
B.	23 18 8	42 7 8	19 5 4	29 17 8	14 18 8	19 17 4	40/0 compound.	Nil.
C.	29 2 0	48 15 0	22 6 0	33 16 0	16 8 0	21 18 0	45/0 simple.	Nil.

Note:—The benefits secured by each separate single premium reduce throughout the term of the policy as age increases.

Tables 3 and 4 have been prepared by *The Conveyancer* in order to assist comparison. The terms, conditions and rates of premium vary between offices and should, therefore, be closely checked before any contract is effected.

With Profits Deferred Annuities, Commencing at age 65

TABLE 3

Pensions secured by £100 Annual Premium

A. Premiums returned *without* interest in the event of death before pension age.

Age next birthday:

Office	35		42		50		Bonus rate assumed per £100 Pension
	Guaranteed Pension £	Estimated Pension £	Guaranteed Pension £	Estimated Pension £	Guaranteed Pension £	Estimated Pension £	
Equity & Law Life Assurance Society.	428	665	293	411	170	211	30/0 compound.
Equity & Law Life Assurance Society. (Guaranteed Pension Options 60–70.)	407	631	279	390	161	201	30/0 compound.
Royal Insurance Company Ltd.	385	644	267	405	158	211	45/0 simple.
Legal & General Assurance Society.	415	601	287	386	165	202	30/0 simple.
Scottish Amicable Life Assurance Society.	355	628	251	390	151	201	40/0 compound.
Scottish Equitable Life Assurance Society.	354	627	248	385	150	200	40/0 compound.
Colonial Mutual Life Assurance Society Limited.	343	594	256	395	158	212	Variable bonus depending upon age and duration.

B. Premiums returned *with* interest as stated in the event of death before pension age.

Age next birthday:

Office	35		42		50		Bonus rate assumed per £100 Pension	Interest Return
	Guaranteed Pension £	Estimated Pension £	Guaranteed Pension £	Estimated Pension £	Guaranteed Pension £	Estimated Pension £		
Equity & Law Life Assurance Society.	401	622	280	393	166	207	30/0 compound.	4% compound.
Equity & Law Life Assurance Society. (Guaranteed Pension Options 60–70.)	380	590	266	373	158	196	30/0 compound.	4% compound.
Royal Insurance Company Ltd.	358	599	253	384	153	205	45/0 simple.	3½% compound.
Scottish Widows' Fund & Life Assurance Society.	312	584	229	370	143	195	44/0 compound.	3½% compound.
National Provident Institution.	407	590	282	379	165	202	30/0 simple.	4% compound.
United Kingdom Provident Institution.	328	630	240	396	149	206	45/0 compound.	3% compound.

TABLE 4

Pensions secured in the first year by £100 Single Premium

In the event of death before age, all or part of premiums are returned with or without compound interest as stated.

Age next birthday:

Office	35		42		50		Bonus rate assumed per £100 Pension	Interest Return
	Guaranteed Pension £ s. d.	Estimated Pension £ s. d.	Guaranteed Pension £ s. d.	Estimated Pension £ s. d.	Guaranteed Pension £ s. d.	Estimated Pension £ s. d.		
Equity & Law Life Assurance Society.	22 18 0	35 11 0	18 10 0	25 18 0	14 12 0	18 3 0	30/0 compound.	4% compound.
Equity & Law Life Assurance Society. (Guaranteed Pension Options 60–70.)	21 14 0	33 14 0	17 10 0	24 10 0	13 16 0	17 2 0	30/0 compound.	4% compound.
Scottish Amicable Life Assurance Society.	23 18 8	42 7 8	19 5 4	29 17 8	14 18 8	19 17 4	40/0 compound.	Nil.
Royal Insurance Company Ltd.	29 2 0	48 15 0	22 6 0	33 16 0	16 8 0	21 18 0	45/0 simple.	Nil.

Note:—The benefits secured by each separate single premium reduce throughout the term of the policy as age increases.

THE MATRIMONIAL HOME; PROPOSALS OF THE ROYAL COMMISSION ON MARRIAGE AND DIVORCE

By F. R. Crane, ll.b., Solicitor

1. General Background and Nature of the Proposals

Two cardinal principles may be said to govern the law and practice of conveyancing in England. One, established by the Settled Land Act, 1882, is that some person shall always have power to deal commercially with the whole legal and equitable title, subject only to a limited number of encumbrances; the other, dating back at least to the Real Property Act, 1845, is that the machinery of conveyancing shall be as simple as possible. Both are related to the needs of our modern urban and industrialised society; both were accepted, underlined and more effectively implemented by the 1925 legislation (*a*).

In 1952, immediately after the decisions in *Errington* v. *Errington* (*b*) and *Bendall* v. *McWhirter* (*c*), the deserted wife's licence to remain in the matrimonial home owned by her husband threatened to become a substantial exception to both principles (*d*). It appeared to vest the beneficial enjoyment of land, for an indefinite period, in a wife whose interest could not be overreached but who could not herself obtain the powers of disposition conferred upon a tenant for life by the Settled Land Act, 1925. At the same time its possible existence imposed on conveyancers the task of inquiring into the matrimonial affairs of a vendor or mortgagor—a task not only unwelcome and difficult, but also judged by many as impossible to discharge satisfactorily.

As a result of more recent decisions the deserted wife has at present no more than a right to remain in the discretion of the

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(*a*) *Cf.* Wolstenholme and Cherry's *Conveyancing Statutes* (12th ed., 1932), Introduction, at p. clxiii: "For many years past the ideal of law reformers has been to enable land to be dealt with as readily as stocks and shares, subject to the necessary modifications in the subject-matter."

(*b*) [1952] 1 K.B. 290.

(*c*) [1952] 2 Q.B. 466.

(*d*) In view of previous discussions in this Journal and elsewhere it does not seem necessary or desirable to set out the existing law or its history extensively. See "Disputes over the Matrimonial Home" by E. F. George (1952) 16 Conv. (N.S.) 27; "Licences and Successors in Title of the Licensor" by F. R. Crane (1952) 16 Conv.(N.S.) 323; "Licences to live in Houses" by L. A. Sheridan (1953) 17 Conv.(N.S.) 440; "The Deserted Wife's Licence" by F. R. Crane (1955) 19 Conv.(N.S.) 343.

court, enforceable against subsequent successors in title who are volunteers or take with notice, but not against purchasers for value without notice. Moreover, her occupation may not *per se* constitute notice, and in any event she may not get more than a few months possession (*e*). This re-establishment of the twin principles of conveyancing has, it is thought, been received with both approval and relief by the majority of the legal profession.

Now, however, the Report of the Royal Commission on Marriage and Divorce (*f*) has reopened the whole question. Though rejecting any proposals for change in the present law during normal marriage, the Royal Commission recommend, briefly (*g*), that on desertion *and also* on a decree of divorce, nullity, or judicial separation (*h*) an order of the court, or in lieu a written undertaking, should give the innocent spouse the right to reside in the matrimonial home owned by the guilty spouse, and that such orders or undertakings should be registrable and should then bind third parties. Effectively, though not technically, the result of these proposals would be the creation of a non-overreachable determinable life interest followed by a legal fee simple in remainder —a situation unknown in England since 1882. Though upholding the principle of simplified conveyancing through the requirement of registration, the Royal Commission advocates a substantial exception to that of free commercial disposition (*i*). The primary purpose of this article is to consider whether this is the best technical method of achieving the general result desired by the Commission, though some expression of opinion on the need for exceptions to the settled principles of conveyancing cannot be avoided.

The Royal Commission make recommendations on similar lines in regard to the contents of the matrimonial home and these are also discussed briefly below.

Reciprocal rights for husband and wife are part of all the recommendations. In modern conditions this seems entirely reasonable. It will, however, be convenient to follow the example of the Report and discuss the problems principally in terms of the wife's rights in the matrimonial home owned by her husband;

(*e*) *Jess B. Woodcock* v. *Hobbs* [1955] 1 W.L.R. 152; [1955] 1 All E.R. 445; *Westminster Bank, Ltd.* v. *Lee* [1956] Ch. 7; see the present writer's discussion at (1955) 19 Conv.(N.S.) 343.

(*f*) Cmd. 9678; Part IX, paras. 595–718, deals with property rights.

(*g*) Details are given later; one member, Sir Frederick Burrows, dissented from all these recommendations for change.

(*h*) This jurisdiction on decree would be new; at present the wife's licence cannot survive the desertion: *Vaughan* v. *Vaughan* [1953] 1 Q.B. 762.

(*i*) Though the initial judicial approach would doubtless be cautious, one must assume that the courts would effectively exercise a jurisdiction conferred by Parliament after ample debate.

unless the contrary is stated the same arguments will apply, *mutatis mutandis*, to a husband's rights in the matrimonial home owned by his wife.

2. Rights in the Matrimonial Home during Normal Marriage

A. Recommendations of the Royal Commission

By a majority the Royal Commission rejected all proposals to vary the present law whereby "... on marriage each spouse now continues to own separately property which belonged to him or her before marriage, and property acquired by one or the other during marriage remains his or her property" (*j*) (para. 597). Twelve members opposed any form of community of property because of difficulties concerning control and division; three members advocated its introduction generally; three would have applied it only to the matrimonial home, and one to the furniture only (paras. 650, 651).

B. Comment

Under existing law a wife cannot, during normal marriage, be ejected from the matrimonial home owned by her husband, but has no rights against any of his successors in title, whether purchasers or, it seems, volunteers (*k*). A husband may be guilty of desertion if he offers a so-called matrimonial home to which the wife cannot reasonably be expected to go (*l*), but this rule will not avail the wife if the old home is sold before the new one is purchased. Prior to desertion a wife can be protected against her husband's caprice or improvidence only by having herself a proprietary interest in the matrimonial home, either alone or as concurrent owner with her husband. In the latter case, which seems to be increasingly common, neither party can turn the other out or force a sale without an order of the court (*m*).

Having regard to the Royal Commission's far-reaching proposals concerning the matrimonial home on the breakdown of marriage,

(*j*) A slight exception was made in relation to household savings, which, it was recommended, should belong to the spouses in equal shares (paras. 699–701).

(*k*) As to purchasers, including mortgagees, see *Lloyds Bank, Ltd.* v. *Oliver's Trustee* [1953] 1 W.L.R. 1460; [1953] 2 All E.R. 1443; *Barclays Bank, Ltd.* v. *Bird* [1954] Ch. 274. By these decisions a wife's licence arises only on desertion, so till then she has prima facie no rights against volunteers. If, however, a voluntary conveyance was part of a design of desertion (*e.g.*, conveyance to the husband's mistress prior to his leaving his wife for her) the court might find a licence—the principles of *Ferris* v. *Weaven* [1952] 2 All E.R. 233 and *Street* v. *Denham* [1954] 1 W.L.R. 624; [1954] 1 All E.R. 532 might perhaps be extended so far.

(*l*) *Dunn* v. *Dunn* [1949] P. 98.

(*m*) *Bull* v. *Bull* [1955] 1 Q.B. 234; Married Women's Property Act, 1882, ss. 12, 17; Law of Property Act, 1925, s. 30.

it is somewhat surprising to find no discussion in the Report of the possibility of giving the wife some security of tenure without a proprietary interest (*n*). For example, it could readily be enacted that a written undertaking by the husband (*o*) or an order of the court should render necessary the wife's consent (or in lieu a further order of the court) to any disposition of the matrimonial home and that such undertakings or orders should be registrable and should then bind all successors in title. The conveyancing situation would be unobjectionable, for it would merely be equivalent to that now created by co-ownership, particularly where the consent of a third party to any sale has to be obtained (*p*). The only question, therefore, is whether legal sanction should be given to what is often a practical feature of married life. It is submitted that consideration ought to be given to legislation on the above lines if and when the recommendations on the Report come to be implemented.

3. Rights in the Matrimonial Home on Desertion

A. Recommendations of the Royal Commission (*q*)

Accepting in principle the right of a deserted wife to some measure of protection in the matrimonial home the Royal Commission recommend:—

(1) A deserting husband who has left his wife in occupation of the matrimonial home should not be able to turn her out without an order of the court (*r*) made in its unfettered discretion after considering all the circumstances (paras. 667–668).

(2) The right to remain in the matrimonial home should not *per se* affect the interest, whenever acquired, of any third party unless (a) the wife obtained either an order of the court or a written undertaking from her husband restraining disposition by him and (b) such order or undertaking were

(*n*) The "homestead" laws of America and some other countries protect the family against both voluntary and involuntary alienation of the matrimonial home —see (1955) 19 Conv.(N.S.), at p. 349.

(*o*) It would be necessary to provide that such undertakings could be ante-nuptial or post-nuptial, with or without consideration, and that the doctrine of undue influence should not vitiate consent by the wife.

(*p*) L.P.A., 1925, s. 26.

(*q*) Sir Frederick Burrows dissented from all these proposals, regarding them as an unwarrantable interference with property rights, and as reflecting the formal, and not necessarily the real, responsibility for the breakdown of the marriage: *Report*, p. 342.

(*r*) The High Court or county court; the Commission carefully reviewed and decisively rejected proposals that this jurisdiction should be exercisable by magistrates' courts (paras. 656–661).

registered under the Land Charges Act, 1925, and express notice thereof given to a landlord (paras. 666–673).

(3) As a corollary a building society or other mortgagee should be bound to accept interest payment of *instalments* (*s*), from the wife; at any time during the continuance of the mortgage or after its redemption the court should have the widest discretion to make a fair division, by any means, between husband and wife (paras. 676–679).

(4) These proposals should apply as far as practicable where the property is owned jointly (*t*).

(5) Reciprocal rights should be available to a deserted husband whose wife leaves him in occupation of the matrimonial home owned by her (para. 681).

B. Comment

In general desertion may be regarded as creating an emergency, but one of limited duration because the desertion itself is likely to terminate within, say, five years by reconciliation, agreed or judicial separation, or divorce. It is therefore thought that the occupational licence, arising out of mere residence and conferring no power of disposition of the land, is appropriate to the situation provided some limit is set to its continuance. Discussion in this section is therefore concerned with details of the recommendations.

(1) *Husband and Wife*

The present law seems effective to implement the recommendations so far as the wife's right against her husband is concerned, though legislation would be needed to achieve reciprocity (*u*). A husband cannot turn his deserted wife out of the matrimonial home without the assistance of the court (*a*), which can and does make orders, under the Married Women's Property Act, 1882, s. 17, protecting her occupation (*b*). These orders also protect infant children residing with the wife (*c*) but apparently no other relatives (*d*), so any legislation should give the court power to allow the wife reasonable latitude in this matter, *e.g.*, to take in

(*s*) The present writer's italics; see *infra*, p. 132.

(*t*) Note at p. 181 of the *Report*.

(*u*) *Report*, para. 614.

(*a*) *Bendall* v. *McWhirter* [1952] 2 Q.B. 466; *Jess B. Woodcock* v. *Hobbs* [1955] 1 W.L.R. 152; [1955] 1 All E.R. 445.

(*b*) See *Lee* v. *Lee* [1952] 2 Q.B. 489; *Lloyds Bank, Ltd.* v. *Oliver's Trustee* [1953] 1 W.L.R. 1460; [1953] 2 All E.R. 1443; *Barclay's Bank, Ltd.* v. *Bird* [1954] Ch. 274.

(*c*) See cases cited in last note.

(*d*) *Murcutt* v. *Murcutt* [1952] P. 266, where the fact that the wife would be compelled to go with an invalid adult child did not affect the court's view.

a companion, or a lodger (*e*). It is worth considering whether this occupational licence should not in any event terminate, say, seven years after the desertion or five years after any order or undertaking whichever be the shorter. So far as conveyancing is concerned the essential matter is to limit the effect of the licence against subsequent purchasers, but a deserting husband should perhaps be allowed to resume control after lapse of the times mentioned.

(2) *Deserted Wife's Rights against Subsequent Successors in Title to Husband*

No change is proposed in the present law whereby the deserted wife's licence arises only at the time of desertion (*f*) (except as regards mortgagees), but as regards subsequent successors in title the recommendations are far-reaching.

(a) In the absence of a registered order or undertaking a deserted wife would be deprived of her present protection against volunteers (*g*), collusive purchasers (*h*), and unsecured creditors claiming through the trustee in bankruptcy (*i*). Since a wife who did not take legal advice would almost certainly not register, the scales would be weighted in favour of an alert and unscrupulous deserting husband. No sufficient justification exists, it is submitted, for this revolutionary proposal to extend the benefits of non-registration from purchasers to non-purchasers, especially as any later purchaser from a volunteer, etc., would only be bound if an order or undertaking was registered (*j*).

(b) The absence of a registered order or undertaking would also deprive a deserted wife of her present right, against a purchaser with notice, to some period of possession longer than the twenty-eight days given by the normal possession order (*k*). On the other hand, after registration, a deserted wife would presumably be allowed to stay for a considerable or even indefinite time. This seems to be a reasonable compromise between the interests of deserted wives and

(*e*) *Bendall* v. *McWhirter* [1952] 2 Q.B. 466, at p. 477, *per* Denning L.J., and comment thereon by Lord Goddard C.J. in *R.* v. *Twickenham Rent Tribunal* [1953] 2 Q.B. 425, at p. 430.

(*f*) *Lloyds Bank, Ltd.* v. *Oliver's Trustee*, *supra*; *Barclays Bank, Ltd.* v. *Bird*, *supra*.

(*g*) *Errington* v. *Errington* [1952] 1 K.B. 290.

(*h*) *Ferris* v. *Weaven* [1952] 2 All E.R. 233; *Street* v. *Denham* [1954] 1 W.L.R. 624; [1954] 1 All E.R. 532.

(*i*) *Bendall* v. *McWhirter* [1952] 2 Q.B. 466; the Report specifically mentions the trustee in bankruptcy as having the benefit of non-registration.

(*j*) L.C.A., 1925, s. 13 (2).

(*k*) *Westminster Bank, Ltd.* v. *Lee* [1956] Ch. 7; see (1955) 19 Conv.(N.S.) 343.

commercial purchasers, especially as, in practice, inspection of the premises by proposing purchasers may give the wife an opportunity to apply for an order. It is suggested, however, that the effect of registration should be limited to five years, and re-registration prohibited. Of course, on a decree of judicial separation or divorce the Royal Commission's new proposals would become operative (*l*).

(c) The Report refers only to the Land Charges Act, 1925, and does not mention the Land Registration Act, 1925. While this is obviously no more than a curious oversight, it would be desirable in legislation to provide that possession by a deserted wife, unprotected by a notice or caution on the register, should not take effect as an overriding interest. At present possession does appear to be an effective alternative to registration in registered conveyancing (*m*).

(3) *Deserted Wife's Rights against Husband's Landlord*

Where the deserted wife's licence is one to remain in a house of which her husband is the tenant, the landlord now retains all his remedies if the terms of the tenancy are not complied with; but (i) cannot accept a surrender from the husband because the latter cannot give up possession while his wife is in occupation (*n*) and (ii) must, it seems, accept payment of rent and performance of covenants from the wife (*o*). It is submitted that no alteration in this law is needed, more especially if the duration of the occupational licence is limited to a maximum of seven years, as suggested above. The Royal Commission's proposals to treat the landlord as a specially favoured third party (*p*) might wreak considerable hardship among the poorer sections of the community who would be unlikely to take legal advice and, at the same time, likely to live in rent-restricted houses of which the landlord would desire early possession. Indeed, it might be preferable to give the court power to transfer periodic or short tenancies (*q*) to the wife, or to require the husband to grant a short sub-lease (or indeed a lease of premises which he holds in fee simple). To make the

(*l*) *Infra*, p. 132.

(*m*) Land Registration Act, 1925, s. 70 (1) (g); *Woolwich Equitable Building Society* v. *Marshall* [1952] Ch. 1.

(*n*) *Middleton* v. *Baldock* [1950] 1 K.B. 657; *R.* v. *Twickenham Rent Tribunal, ex p. Dunn* [1953] 2 Q.B. 425.

(*o*) The court appears to have proceeded on this assumption in *R.* v. *Twickenham Rent Tribunal, supra*; the rule, if it is one, can be justified through the wife's agency of necessity, which, however, does not enable her to take advantage of all legislation protecting tenants—*R.* v. *Twickenham Rent Tribunal, supra.*

(*p*) It appears that he is only to be bound by an order or undertaking after service of notice thereof: paras 671–673.

(*q*) *e.g.*, terms originally granted for twenty-one years or less with no more than five or seven years to run.

wife a genuine tenant would avoid a number of difficulties and anomalies (*r*).

(4) *The Deserted Wife's Right against Prior Mortgagees*

Under the present law a deserted wife has no right against a mortgagee whose mortgage precedes the desertion (*s*), nor has she, apparently, any implied authority to make mortgage payments on her husband's behalf (*t*). So many homes are mortgaged, and a deserting husband may so readily fail to perform the terms of his mortgage, that it seems desirable to accept the Royal Commission's recommendation. Indeed, to avoid anomalous hardship, it should be extended to payment of interest under fixed mortgages, and performance of any other terms, *e.g.*, insurance. However, any legislation should, it is submitted, clearly and precisely provide that the mortgagee's powers to realise his security, as they now stand (*u*), should not be affected. Any prospect that those powers might be controlled by the court by reference to the mortgagor's marital mishaps rather than the desires of the mortgagee would inevitably discourage loans to married men (*a*). This discouragement would obviously apply more forcibly to private lenders, such as trustees, than to building societies; nevertheless, there does not seem to be need to differentiate, though it would be quite practicable.

The close control, as between husband and wife, contemplated by the Commission would involve some expense, but this does not seem to be avoidable.

4. Rights in the Matrimonial Home after a Decree of Divorce, Nullity or Judicial Separation

A. Recommendations of the Royal Commission

As "a desirable and indeed necessary extension of the wide power which we consider the court should have to make suitable financial arrangements" (para. 687) the Royal Commission propose (*b*) (paras. 587–698) that, when a marriage has been terminated

(*r*) In addition to the point in *R.* v. *Twickenham Rent Tribunal, supra*, the deserted wife's licence has led to difficulties over liability for rates (*Cardiff Corp.* v. *Robinson* [1956] 3 W.L.R. 522; [1956] 3 All E.R. 56; *Robinson* v. *Taylor* [1948] 1 K.B. 562) and the position in tort is uncertain (*e.g.*, as regards trespass, nuisance and liability for dangerous things).

(*s*) *Lloyds Bank, Ltd.* v. *Oliver's Trustee* [1953] 1 W.L.R. 1460; [1953] 2 All E.R. 1443; *Barclays Bank, Ltd.* v. *Bird* [1954] Ch. 274.

(*t*) Report, para. 676. The mortgagee may, of course, accept payments voluntarily. Possibly the court might extend the agency of necessity to mortgage payments.

(*u*) L.P.A., 1925, ss. 101 *et seq.*

(*a*) *Cf.* Harman J. in *Barclays Bank, Ltd.* v. *Bird* [1954] Ch. 274, at p. 279.

(*b*) Sir Frederick Burrows again dissenting: Report, p. 542.

by a decree of nullity, divorce or judicial separation (*c*), the court should have jurisdiction, on application of the *innocent* party only:

(1) to make an order allowing the applicant, whether or not in occupation at the time of the hearing, to reside until further order in the matrimonial home owned or held on long lease at a ground rent by the other spouse, or so owned or held jointly, such order to be registrable and then to bind successors in title;

(2) to transfer to the applicant, until further order, any tenancy of the matrimonial home to which the Rent Restrictions Acts apply, the landlord having a right to be heard; on cancellation of an order the tenancy to revert to the husband;

(3) to restrain the respondent in the relevant proceedings from disposing of the matrimonial home pending the outcome of such proceedings and any order as above, such temporary order also to be registrable and then to bind successors in title.

The Royal Commission also recommend that a mortgagee should be bound to accept payment of instalments from a former (or prospective former) spouse as well as from a deserted spouse (*d*).

B. Comment

(1) *Occupational Licence.* At present the court has jurisdiction only to vary ante-nuptial or post-nuptial settlements of the matrimonial home, though for this purpose concurrent ownership by husband and wife appears to constitute a settlement (*e*).

The Report elsewhere recommends that the court shall have power to order a settlement by either spouse on a decree of nullity or divorce, but not on a decree of judicial separation (*f*).

The question to be decided is whether any further special jurisdiction relating to the matrimonial home is required, beyond power to restrain dealings pending suit (*g*). It is submitted that no sufficient case has been made out for a new and extended occupational licence which would constitute a substantial exception to the principle of free commercial disposition. The

(*c*) The Commission was a little hesitant about including judicial separation (para. 693).

(*d*) Para. 697, last sentence, incorporating the recommendation on desertion (para. 686).

(*e*) Matrimonial Causes Act, 1950, s. 25; *Bacon* v. *Bacon* [1947] P. 151. In addition a wife can be ordered to settle property, but a husband cannot, though he may have to provide secured maintenance: Report, para. 512.

(*f*) Para. 520.

(*g*) If the husband was in possession, and a life interest conferred on the wife, she would thereby be able to demand possession: *cf. Bacon* v. *Bacon*, *supra*.

"emergency" of desertion is absent; an order would not be worth while if residence by a former spouse was to be limited to a short period; the guilty spouse would hardly be likely to make plans, as a deserting husband might, on the basis of eventual reoccupation of the matrimonial home. Therefore, the interest to be created in the matrimonial home should fall within the normal pattern of the 1925 legislation, through the medium of either settlements or tenancies.

Any settlement, though always terminable or variable by order of the court, should in the meantime operate in the normal manner. Thus the wife, as tenant for life under the Settled Land Act, 1925 (or trustees for sale under the Law of Property Act, 1925), should have the usual powers to sell, lease, etc., and the wife should be entitled to interest on the proceeds of sale, or to the rent, in lieu of residence. To make her interest automatically determinable on cesser of residence would provide just that discouragement to commercial dealing which the Settled Land Act forbids (*h*). In exercising this jurisdiction the court would necessarily take into account the existing occupation of the matrimonial home, so no special provision would need to be made for a spouse who was not residing there. A life interest would automatically carry the right to possession.

It might also be convenient to give the court alternative jurisdiction to permit or require the husband to grant a lease or sublease to his former wife. Such tenancy, being for a fixed term terminable by order of the court, would fall within the definition of a legal term of years (*i*).

The position on a decree of judicial separation remains to be considered. The Royal Commission distinguish such a decree from one of divorce and nullity as regards the proposed jurisdiction to make settlements (*j*), and to divide the contents of the matrimonial home (*k*), but, as shown above, identify it in regard to residence in the matrimonial home. If residence in the former matrimonial home after judicial separation is likely to last as long as residence after divorce or nullity (which would seem to be the case) the conveyancing problems are the same. It is therefore submitted that jurisdiction to order settlements, and also tenancies, should be available on a decree of judicial separation.

(2) *Transfer of Tenancy.* The creation of a settlement, though it should probably be possible in all cases, would be unsuited to periodic or short tenancies. The proposed jurisdiction to transfer

(*h*) S.L.A., 1925, s. 106, replacing S.L.A., 1882, s. 52.
(*i*) L.P.A., 1925, s. 205 (1) (xxvii); *Lace* v. *Chantler* [1944] K.B. 368.
(*j*) Paras. 519, 520.
(*k*) Para. 697 (iii).

such a tenancy would be more useful but, provided the landlord can be heard and is willing to accept the wife as tenant, it does not seem necessary to limit the jurisdiction to tenancies within the Rent Restrictions Acts. It is submitted, however, that such transfers should be final, without possibility of reverter to the husband. If the tenancy is subject to the Rent Restrictions Acts, the case for eventual reverter to the husband is stronger, but it would be difficult to ensure that while tenant the wife did not, either voluntarily or involuntarily, give the landlord one of the statutory grounds for terminating the tenancy. What then would become of the husband's reversion? Only an outright transfer would seem to be really practicable, unless there are to be frequent applications to the court concerning small properties.

(3) *Interim jurisdiction during proceedings.* This recommendation is a necessary corollary to any new jurisdiction, whether that proposed by the Royal Commission, or the alternative submitted in this article.

(4) *Mortgagees.* Any mortgagor can, of course, settle or lease the mortgaged premises, though a lease without the consent of the mortgagee may amount to a breach of covenant and is unlikely to bind the mortgagee (*l*). Nevertheless, the Commission's recommendation seems necessary if residence in the former matrimonial home is to be secure. Once again, the proposal should be extended to interest on fixed mortgages, and should not prejudice the mortgagee's ordinary rights to enforce his security (*m*).

5. Contents of the Matrimonial Home

A. Recommendations of the Royal Commission

The Royal Commission, treating the contents (*n*) of the matrimonial home as an adjunct to the home itself, propose:—

(i) no change in the present law during normal marriage (*o*);

(ii) that the deserted wife in the matrimonial home should have a right to the use of such furniture and equipment as is essential to the running of the home, so that such articles should not be removable by the husband without an order of the court, which could equally restrain him from dealings (*p*); the wife should have the right to make hire-purchase payments (*q*);

(*l*) L.P.A., 1925, s. 99; *Dudley and District Benefit Bldg. Soc.* v. *Emerson* [1949] Ch. 707; most mortgages restrict the statutory power of leasing.

(*m*) *Supra*, p. 132.

(*n*) As to definition of "contents," see *infra*, p. 139.

(*o*) Paras. 597, 650, 651. See *supra*, p. 127, note (*j*) as to the exception of savings from a housekeeping allowance.

(*p*) Paras. 674, 685.

(*q*) Paras. 681, 686.

(iii) that on a decree of judicial separation a wife should have a similar right to use of the contents (*r*);

(iv) that on a decree of divorce or nullity the court should have jurisdiction to make an equitable division of the contents (including articles on hire-purchase) between the spouses, and also to make interim orders restraining disposition pending suit (*s*);

(v) reciprocal rights for husbands (*t*).

B. Comment

(1) *The Present Law.* A brief outline of the present law will provide the background to the proposals.

(a) Title to contents of the matrimonial home

The contents of the matrimonial home, like any other chattels, may be owned by husband, or by the wife, or by both together either jointly or in shares.

(b) Disputes between husband and wife

Disputes between husband and wife relating to the possession of or title to the contents may be resolved by proceedings under the Married Women's Property Act, 1882, s. 17; no other action is open to the husband, but the wife can also sue in tort to protect her property (*u*). Where the spouses seek a division of property under section 17 the court will give effect to any legal title that may be proved (*a*), but if, as often happens, the evidence as to title is inconclusive the court will make as fair a division as possible with a predilection for equality (*b*). If on desertion the wife is left in possession of the contents of the matrimonial home there will be a dispute about possession even if the title is clear (*c*). Though there has been little litigation, the court appears to have jurisdiction to refuse the husband possession and, presumably, to restrain him from dealings. It appears that the court may not always take the view that the contents should go with the home;

(*r*) Para. 697 (iii).

(*s*) Paras. 691–698.

(*t*) Para. 694.

(*u*) Married Women's Property Act, 1882, ss. 12, 17; *Larner* v. *Larner* [1905] 2 K.B. 539 (action of detinue by wife); as to interpleader where third parties are involved, see *De La Rue* v. *Herner, Peron & Stockwell, Ltd.* [1936] 2 K.B. 164.

(*a*) *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63; *Cobb* v. *Cobb* [1955] 1 W.L.R. 731; [1955] 2 All E.R. 696; *Re Bettinson's Question* [1956] Ch. 67.

(*b*) *Rimmer* v. *Rimmer, supra*; *Cobb* v. *Cobb, supra*; *Fibrance* v. *Fibrance* [1957] 1 W.L.R. 384; [1957] 1 All E.R. 357. The destination of wedding presents might be determined according as the donors were friends or relations of the husband or the wife: see dicta in *Hichens* v. *Hichens* [1945] P. 23, at p. 26, *per* Lord Goddard C.J., and in *Lee* v. *Lee* [1952] 2 Q.B. 489n, at p. 491, *per* Somervell L.J.

(*c*) See *Re Bettinson's Question, supra.*

for example in *W.* v. *W.* (*d*) Devlin J. ordered a wife, who was partly to blame for the estrangement, to hand over a substantial part of the contents as "their removal will not leave the flat empty and the wife could replace them in time" (*e*).

A wife living with her husband has prima facie authority to pledge his credit for necessaries, such articles as fall within the domestic department usually confided to the wife and are suitable to the matrimonial standard set by the husband (*f*); this authority can, however, be terminated by the husband's forbidding her to pledge his credit (*g*). A deserted wife has an irrevocable authority to pledge her husband's credit for necessaries; in one of the older cases, which might not now be followed, it was held she could thereby furnish a home (*h*). Of course, the advantages of either form of agency are dependent on finding someone who will give the husband credit.

After the marriage has ended (by divorce, nullity or death) the Married Women's Property Act, 1882, ceases to apply (except as to proceedings already begun, which will continue to their conclusion (*i*)), so any dispute as to property will be determined as between strangers; for example, by an action for conversion.

(c) Third Parties

Either spouse, having both possession of, and title to, a chattel, can transfer it to a third party by gift, sale, pledge, or involuntarily on bankruptcy (*j*). During normal marriage, therefore, a wife has no protection against her husband's caprice or improvidence, nor after desertion if he manages to gain possession (*k*). If after

(*d*) [1951] 2 T.L.R. 1135. Orders in the reported cases restraining the husband from dealings with the matrimonial home do not seem to mention the contents specifically, though the clause restraining the husband from interfering with the wife's occupation would prevent him acting otherwise than under the Married Women's Property Act, 1882, s. 17.

(*e*) *Ibid.*, at p. 1136.

(*f*) *Phillipson* v. *Hayter* (1870) L.R. 6 C.P. 38; *Debenham* v. *Mellon* (1880) 6 App.Cas. 24.

(*g*) *Debenham* v. *Mellon*, *supra*; the presumption of agency can also be rebutted by showing that the wife has an adequate allowance, or is already adequately supplied.

(*h*) *Hunt* v. *De Blaquiere* (1829) Bing. 550—a wife, though having £380 p.a. alimony, held entitled to pledge her husband's credit to furnish a house, the court saying that lodgings were unsuitable to her station in life as the daughter of a Marquis. The wife's own means are relevant in determining what are necessaries: *Biberfeld* v. *Berens* [1952] 2 Q.B. 770.

(*i*) *Fibrance* v. *Fibrance* [1955] 3 All E.R. 789 (P.D.A.).

(*j*) Thus, a common problem, where the husband goes bankrupt and the wife asserts a title derived from her husband is to determine whether possession of the chattel has passed to her so as to cease to be property in his reputed ownership; Bankruptcy Act, 1914, ss. 38, 167; *Ramsay* v. *Margrett* [1894] 2 Q.B. 18; *French* v. *Gething* [1922] 1 K.B. 236.

(*k*) See *Lloyds Bank, Ltd.* v. *Oliver's Trustee* [1953] 1 W.L.R. 1460; [1953] 2 All E.R. 1443, where the husband after desertion took and sold the furniture while the wife was in hospital.

desertion the wife retains possession of the contents of the matrimonial home the husband cannot transfer title by delivery, but he can make a deed of gift (*l*), a bill of sale (*m*), or a normal sale; on sale of goods in a deliverable state, which would include household chattels, title normally passes on the contract (*n*). Thus, the problem of the rights of successors in title to the husband's chattels against a deserted wife in possession may yet have to be solved by the courts; perhaps they would follow, in principle, the cases on the matrimonial home (*o*).

On the other hand, a deserted wife in possession of the contents of the matrimonial home appears as owner, and may make a purported transfer, with the result that an innocent third party will become liable in conversion (*p*).

(2) *Effect of the Royal Commission's recommendations.* The Royal Commission's recommendations would leave unchanged the law concerning the contents of the matrimonial home during normal marriage (*q*), but would ensure that on desertion the court has power to ensure that the contents go with the home. The latter proposal, including the provision about hire-purchase, is obviously reasonable, especially if the deserted wife's licence is limited in duration as suggested above (*r*). The court should, it is suggested, be given power to make any desirable ancillary orders, *e.g.*, as to insurance, and as to the wife's duty to replace breakages. It would also be worth considering whether any register, perhaps run in conjunction with the register of bills of sale (*s*), should be kept of orders under this jurisdiction. An order would give possession of chattels to a non-owner for a considerable time and this is the situation, though arising differently, that the Bills of Sale Acts were designed to meet. The recommendation that on a decree of divorce or nullity it should be possible to confer benefits on the innocent spouse in kind as well as in cash also seems entirely reasonable. It is submitted, however, that judicial separation should here, as in the case of the home itself, be classified with

(*l*) *Cochrane* v. *Moore* (1890) 25 Q.B.D. 57 establishes delivery or deed of gift as the means of voluntary transfer of chattels.

(*m*) See Bills of Sale Act, 1878, s. 4.

(*n*) Sale of Goods Act, 1893, ss. 17, 18 (i); goods are in a "deliverable state" under the Act when they are in such a state that the buyer would under the contract be bound to take delivery of them: s. 62 (4).

(*o*) See the wide language of all the judgments in *Bendall* v. *McWhirter* [1952] 2 Q.B. 466.

(*p*) Unless, by stretching the Sale of Goods Act, 1893, s. 21 (i) the deserting husband is, *ipso facto*, by his conduct precluded from denying his wife's authority to sell. This does not seem a likely decision.

(*q*) Except as regards savings out of housekeeping money, *supra*, p. 127, note (*j*).

(*r*) *Supra*, p. 130.

(*s*) See Bills of Sale Acts, 1878 and 1882.

divorce and nullity rather than desertion; the owner of furniture the subject of an order on judicial separation would normally regard it as permanently gone so far as user was concerned. Moreover, licences to use chattels, like licences to use the matrimonial home, should be kept to the minimum necessary to avoid hardship.

(3) *An alternative suggestion.* It is submitted that the present law and the recommendations of the Royal Commission still leave the law concerning the contents of the matrimonial home defective in at least four respects. First, as already noted, the wife (*t*) and children are at the mercy of the husband's caprice or improvidence; secondly, the frequent lack of clarity in the arrangements between husband and wife can only be resolved (unless the parties can agree) at the cost of an application to the court, which may have to reach a rough-and-ready solution; thirdly, transferees may easily get a bad title because husband and wife can so readily dispose of one another's goods; fourthly, after the death of either spouse there may be difficulty if the personal chattels have been bequeathed to someone other than the surviving spouse (*u*).

Having regard to the above points, the court's presumption of equality in the absence of evidence, and the effective practice in many homes, would it not be desirable to enact that, in the absence of written contrary intention, the contents of the matrimonial home should be deemed to belong to the parties either jointly or in equal shares, preferably the former? Such a rule would, it is submitted, give some protection to the family without undue prejudice to persons dealing commercially with either spouse, simplify questions of title both *inter vivos* and on death, and provide a strong incentive to an agreed division on breakdown of marriage (*a*). If the contents of the home were especially valuable no doubt husband and wife would be "property-conscious"—as so many are not—and enter into written arrangements. The jurisdiction to divide the contents of the matrimonial home on a decree of divorce or nullity (and perhaps judicial separation) should remain, but might need to be invoked only rarely.

(4) *Definition of "Contents" of the Matrimonial Home.* Any legislation implementing the Report, with or without variations such as those suggested above, would need to include a definition

(*t*) Or, of course, the husband, *mutatis mutandis*.

(*u*) The writer was recently concerned in a case where by her will a wife left her personal chattels (other than jewellery which was separately bequeathed) to her husband for life and then to her daughter absolutely. The husband said a substantial part of the furniture was his. Happily father and daughter were agreed, but the circumstances gave them every opportunity for a dispute.

(*a*) A dispute would need to be resolved under the Married Women's Property Act, 1882, s. 17.

of "contents," though one is not attempted by the Royal Commission (*b*), so as to make clear the extent of the jurisdiction of the court. The definition of "personal chattels" in the Administration of Estates Act, 1925, s. 55 (1) (x) might be used as a guide.

On this basis "contents" might be defined to comprise (*c*) "garden effects, plate, plated articles, linen, china, glass, books, pictures, prints, furniture (including pianos (*d*)), articles of household use or ornament but not any chattels used for business purposes nor money or security for money." This list should be subject to written variation by the parties.

6. Conclusion

The recommendations of the Report discussed above indicate that, as regards the matrimonial home and its contents, the Royal Commission found some substance in the charge that English law places property before persons. The criticism here made is that the Royal Commission sought remedies only through community of property and the occupational licence, rejecting the former as alien to our system of law, but accepting and extending the latter. Yet, as has been shown, the deserted wife's licence creates an exception to the settled principles of conveyancing; its justification lies in the need to meet, by means of the limited weapons available to the court, the emergency of increased desertion combined with an acute housing shortage. Legislation need not be so restricted in approach, but should rather take advantage of the ample means which conveyancers have at their disposal for making adequate provision for all the members of a family. Only the emergency of desertion requires a limited use of the occupational licence. The other results desired by the Royal Commission and also some protection for the family during normal marriage can and should, it is submitted, be achieved within the normal framework of property rights.

(*b*) Except to say (para. 674) that the deserted wife needs the use of such furniture and equipment as is "essential for the running of the home."

(*c*) The items included in "personal chattels" under the Administration of Estates Act, 1925, s. 55 (1) (x) but excluded from this suggested definition of "contents" are "carriages, horses, stable furniture and effects, motor-cars and accessories, domestic animals, jewellery, articles of personal use or ornaments, musical and scientific instruments [other than the piano], wines, liquors and consumable stores."

(*d*) The piano, alone of musical instruments, should perhaps be within contents because of the likelihood of the wife being left with children who might be learning to play it.

THE MEANING OF "LAND" IN ADMINISTRATIVE STATUTES

By J. F. Garner, ll.m., Solicitor

A few months ago, Dr. A. K. Kiralfy discussed in this *Journal* the meaning of the word "land" as used in the property legislation of 1925 (*a*); his remarks have suggested to the present writer the need to examine the meaning of the same word as used in various administrative statutes, such as the Public Health Acts and the Housing Acts.

"Land" is a word which may give rise to two difficulties of interpretation of a different nature; first, as to the exact physical extent of the term—does it refer only to the soil itself, does it include land covered with water, and does "land" extend *usque ad coelum et ad inferos*? Secondly, does the term include estates and interests in land, or is it confined in the particular context to the physical entity (*aa*)? These two questions will often have to be answered differently in different contexts, but before we pass to an examination of particular statutes a few general observations may be of value.

The leading case on the meaning of "land" in the physical sense is *Corbett* v. *Hill* (*b*), the remark of James V.-C. being often cited: "The ordinary rule of law is that whoever has got the *solum*, whoever has got the site, is the owner of everything up to the sky and down to the centre of the earth," and in *Newcomer* v. *Coulson* (*c*), in another much cited passage, Jessel M.R. said, "now 'land' according to English law includes everything on or under the soil; all buildings that you may erect on it; all mines that you may sink under it." These observations, made in connection with the construction of deeds, are subject to the contrary intention appearing in the particular context or to be deduced from the instrument or statute under construction; thus, in *Truckell* v. *Stock* (*d*), the footings of a house which were under the defendant's land were held to have vested in the plaintiff as being part of the house which had been expressly conveyed to him, although the soil above and below these footings, and the column of air above

(*a*) 20 Conv.(N.S.) 10.

(*aa*) Whether or not "land" includes an undivided share in land is another question which is not in practice likely to arise in the context of the statutes here under consideration.

(*b*) (1870) L.R. 9 Eq. 671.

(*c*) (1877) 5 Ch.D. 133.

(*d*) [1957] 1 W.L.R. 161.

had not vested in him, these being excluded from the conveyance as shown by the plan.

On a logical application of this general rule, "land" should be read as including land covered with water, but it has been considered necessary expressly so to provide in some statutes, such as reg. 100 of the Defence Regulations, 1939, and section 49 of the Coast Protection Act, 1949; and in section 81 of the Land Drainage Act, 1930, it is provided that "land" shall include "water."

The general rule as above expressed goes back at least to the days of Coke: "'Land,' 'Terra' in the legal signification, comprehendeth any ground, soile, or earth whatsoever, as meadows, pastures, woods, moores, waters, marishes, furses and heath. . . . It legally includeth also all castles, houses and other buildings; for castles, houses, etc., consist upon two things, *viz.*, land or ground, as the foundation or structure thereupon; so as passing the land or ground, the structure or building thereupon passeth therewith" (*e*).

In the case of statutes enacted since 1850, and in addition to any special interpretation clause in the particular statute, we have the assistance of section 3 of the Interpretation Act, 1889, which provides that, subject to the contrary intention appearing, "land" is to include (*f*) "messuages, tenements and hereditaments, houses and buildings of any tenure." (This definition is hereinafter referred to as "the Interpretation Act definition.") Nevertheless, statutory definitions must always be examined within the context of the particular case. As was said by Sir Wilfrid Greene M.R. in *Re Camberwell (Wingfield Mews) Clearance Order* (*g*), when considering the meaning of the word "house," "However, as frequently happens in dealing with Acts of Parliament, words are found used—and very often the commoner the word, the greater the doubt it may raise—the application of which to individual cases can only be settled by the application of a sense of language in the context of the Act, and, if I may say so, a certain amount of common sense in using and understanding the English language in a particular context." Even if there is a special statutory definition in the particular case, unless this is expressed to be exclusive by the use of the word "means" or otherwise, it

(*e*) Co.Litt. 4a.

(*f*) Not "mean." "'Means' in a definition is restricted to that which is specifically described or defined. When used in contrast to 'means,' the word 'includes' is not restrictive; it signifies that that which is 'included' is in addition to something else that is not specifically stated to be so included": *per* O'Halloran J.A. in the Canadian case of *R.* v. *McLeod* [1950] 2 W.W.R. 456, at p. 462.

(*g*) [1939] 1 All E.R. 590, at p. 597.

seems that the Interpretation Act definition must be taken into account as well as the special definition: *generalia specialibus non derogant* (*h*).

Thus, in the normal case, both at common law and under the Law of Property Act, 1925 (*i*), "land" includes any buildings standing thereon, but this extended meaning may, of course, be excluded in the particular context. For example, in the Canadian case of *Dominion Fire Brick & Clay Products, Ltd.* v. *Elmsthorpe Rural Municipality* (*j*), it was held that for the purposes of the Rural Municipality Act, 1935, "'land' was equivalent to 'soil,' and did not include buildings," and in another Canadian case (*k*), the term was said to include minerals, but not gold and silver. In a local Act, imposing a lighting rate, "any land whatsoever" was excepted from the burden of the rate; it was held in one case (*l*) that a line of railway was not entitled to exemption as it was not "land," but in a second case, on the construction of a different local Act to the similar effect, the court came to the opposite conclusion (*m*). The context makes all the difference.

In many statutory definitions, the word "land" is expressly enlarged to include estates or interests in land. It is quite clear that in the ordinary dictionary meaning of the term, and at common law, "land" cannot include estates or interests; "'easement, right, power or privilege over, in or in connection with land,' does not strictly come within 'land'" (*n*). The abstract legal concepts are, however, indirectly brought within the term by the Interpretation Act definition given above. A "messuage" is virtually synonymous with a dwelling-house (*o*), but "hereditaments" may be corporeal or incorporeal, and "the word 'hereditament,' when used in relation to land, sometimes denotes the land itself as a physical object, and sometimes the estate in the land" (*p*);

(*h*) In the Compensation (Defence) Act, 1939, however, it was considered necessary to include in the special definition of "land" in s. 17 (1), an express saving of the effect of the Interpretation Act definition.

(*i*) See s. 205 (1) (ix).

(*j*) [1940] 3 W.W.R. 139.

(*k*) *Wardle* v. *Manitoba Farm Lands Association* [1954] 14 W.W.R. 289.

(*l*) *R.* v. *Midland Ry.* (1855) 4 E. & B. 958.

(*m*) *R.* v. *Midland Ry.* (1875) L.R. 10 Q.B. 389. In the *first* of these two cases, it was provided in the statute that buildings, tenements, hereditaments, etc., should be subject to the rate, but that "land" should be exempt; therefore, as Blackburn J. said (at p. 393) in the second case, "the only sense that could be put on 'land' in that Act, from the context and way in which it is brought in, was land in its natural state." In the second case, however, the antithesis was between land which has been built upon and "land" as a general word, and it was held that in that context a line of railway was "land," that had not been built upon.

(*n*) *Commonwealth* v. *New South Wales* (1923) 33 C.L.R. 1 (an Australian case).

(*o*) *Fenn* v. *Grafton* (1836) 2 Bing.N.C. 617; *Karslake* v. *White* (1819) 2 Stark. 508.

(*p*) Challis, *Real Property* (3rd ed.), p. 44.

" tenement " merely refers to any physical entity which can be the subject of tenure at common law (*q*).

It is now proposed to consider some of the more important " sundry curious meanings which have also been affixed to the word 'land' by special interpretation clauses contained in particular Acts . . . these meanings are confined to the particular Acts which they serve to illustrate or obscure " (*r*). In the cases hereafter discussed, the special definitions cited apply only to the particular statutes in which they appear, and they are invariably expressed to apply *except* where the context otherwise requires (or words to the like effect); a phrase which is itself difficult to apply in practice.

(i) *Lands Clauses Consolidation Act, 1845, s. 3.* In this section it is provided that " ' lands ' shall extend to messuages, lands, tenements and hereditaments of any tenure." The extended definition of the Interpretation Act, 1889, does not apply in this case, the Act having been passed prior to 1850, and " land " does not, by definition, include buildings built on land other than dwelling-houses, or " messuages "; however, the ordinary common law rule applying the term to any kind of buildings does not seem to be excluded by the definition. In this particular statute, the exact meaning of the term is not often likely to be of great importance, as it is a procedural statute only, like the Acquisition of Land (Authorisation Procedure) Act, 1946 (*s*), and it comes into effect only when, and only to the extent that, it is incorporated or applied by some enabling statute.

The same definition appears also in the Town Police Clauses Act, 1847 (*t*), and the Towns Improvement Clauses Act, 1847 (*u*), in section 3 thereof in each case. In this context, it seems reasonably clear that the draughtsman had only the physical entity in mind, with " messuages," but not other buildings, thereon where appropriate. For example, it is submitted that section 27 of the Police Clauses Act authorising the Commissioners to purchase a " piece of land " for a pound for keeping cattle could not be read

(*q*) Leasehold estates are not hereditaments, as they did not pass to the heir at law, but they are, it is submitted capable of falling within the expression " tenements," being the subject of tenure at common law, in spite of the erudite arguments to the contrary put forward in the third edition of *Challis*, at p. 424.

(*r*) Challis, *Real Property* (3rd ed.), p. 42.

(*s*) By section 8 (1) of this Act it is provided that " ' land ' in relation to compulsory purchase under any enactment includes anything falling within any description of the expression in that enactment."

(*t*) Most of the provisions of this Act are in force in all boroughs and urban districts by virtue of section 171 of the Public Health Act, 1875.

(*u*) Most of the provisions of this Act are in force in all boroughs and urban districts by virtue of section 160 of the Public Health Act, 1875.

to include land encumbered with buildings. The sections of these Acts in which the term appears do not suggest that "land" is to be understood as including easements or similar rights and it is submitted that the closing words of the definition "of any tenure" were included *ex abundanti cautela* to indicate that there was no difference for the purpose of the particular enactment between land held of freehold tenure and that held of copyhold tenure.

(ii) *Public Health Act, 1875, s. 4.* Here it is provided that "'lands' and 'premises' include messuages, buildings, lands, easements and hereditaments of any tenure," and the Interpretation Act definition will also, it is submitted, apply. It is clear that all types of buildings standing on the land are to be included, unless the context otherwise requires, and also that legal interests and rights over land are to be treated as land where necessary. In cases where section 150 of this Act was under consideration (this is the section that enables the local authority to recover their expenses incurred on private street works from the frontagers in the street), it was held that "land" included a slope up to an embankment (*v*), and also the parapet walls of a bridge (*w*). The Public Health Act, 1936, has a more modern definition; by section 343 (1), "land" "includes any interest in land and any easement or right in to or over land."

This latter definition is not always easy to apply in particular cases. Thus, section 15 of the 1936 Act empowers a local authority to lay a public sewer "in or over any land not forming part of a street." Does this section empower a local authority to lay their sewer under a dwelling-house or other building erected on land? It is submitted that the courts would construe such a power as strictly as possible and would try to avoid granting such a gross interference with the private ownership of property, although there is provision for compensation to be paid by the local authority under section 278 of the Act. The section does not confer a right to lay the sewer "through" land, and the reference to a "street" also suggests that the statute contemplates land unencumbered with buildings. In section 24, however, the word "land" appears again. In this section, the local authority are empowered to recover expenses incurred by the authority in the maintenance of certain lengths of public sewer, according to such proportions as they may consider it fair to fix, taking into account all the circumstances of the case, including "the distance for which it is laid in land belonging to each owner." Under section 24 (4), these lengths

(*v*) *Higgins* v. *Harding* (1872) L.R. 8 Q.B. 7.
(*w*) *G.E.R.* v. *Hackney Board of Works* (1883) 8 App.Cas. 487.

of sewer need not necessarily lie through land unencumbered by buildings (*x*), and it is submitted that within the context now mentioned "land" is capable of being construed as applying also to land and buildings. The term "land" also appears, in connection with private rights of drainage, in section 37 (3) and section 90 (6), and again there seems to be no reason why the term should not be understood so as to include land encumbered with buildings.

In the Public Health Acts, "premises" is understood in much the same sense as "land"; thus, in section 343 (1) of the 1936 Act, it is provided that "'premises' includes messuages, buildings, lands, easements and hereditaments of any tenure," and this term is of particular importance in section 92, the section listing matters which are to be regarded as "statutory nuisances." There must be some degree of permanency about "premises," but a moored houseboat was held to come within the term (for the purposes of the Water Act, 1945, in which a similar interpretation appears) (*y*), and so did a cave in a hillside used as a store (*z*). However, in an Australian case it was said, "I think that we should adhere to the rule laid down that bare land without buildings, if let for the purpose of occupation as bare land, does not constitute 'premises.' If land is let upon terms that the tenant shall or may erect buildings which are not removable by him but will pass with the freehold, then I should say that the land and buildings when erected would form premises" (*a*).

(iii) *Land Drainage Act, 1930, s. 81.* "'Land' includes water and any interest in land or water and any easement or right in, to or over land or water." In an appropriate context, therefore, "land" could include a fishery, but this cannot apply in all cases; thus, in section 35, which imposes a duty to maintain a watercourse in certain circumstances on the person having control thereof, or on the person occupying the land through which the watercourse passes, it is obvious that the person referred to is the occupier of the land itself, and not some person entitled to a common or several fishery over that watercourse. In section 45 (1), a drainage board are empowered to acquire, by agreement, "land for any

(*x*) See s. 24 (4) (a). In the case of lengths of sewer falling within s. 24 (4) (b), it is reasonably clear that the land through which such lengths are laid must be unencumbered with buildings.

(*y*) *West Mersea U.D.C.* v. *Fraser* [1950] 2 K.B. 119.

(*z*) *Gardiner* v. *Sevenoaks R.D.C.* [1950] 2 All E.R. 84 dealing with the use of the word "premises" in the Cinematograph Act, 1922, in which there is no definition of the term.

(*a*) *Per* Dixon J. in *Turner* v. *York Motors Proprietary, Ltd.* (1951) 85 C.L.R. 55.

purpose connected with the drainage of land, or purchase by agreement any water-mill, dam, weir, or other work or any easement which interferes with the proper drainage of their district." In spite of the definition in section 81, it is submitted that a drainage board (*b*) could not use this power to acquire a right over land, such as a right of fishery, as in the latter part of the section it has been considered necessary specifically to refer to "easement." Again, in section 51 (1), county and county borough councils were empowered to authorise "any person to enter on and inspect any land." It is by no means clear that "land" in this context is intended to apply to land encumbered with buildings, so as to include water-mills and the like, especially as in the somewhat similar section 43, which gives powers of entry to persons authorised in that behalf by drainage boards, it was considered necessary specifically to mention "the interior of mills through which water passes or in connection with which water is impounded," as well as "land" itself.

(iv) *Restriction of Ribbon Development Act, 1935, s. 24 (1)*, and *Trunk Roads Act, 1936, s. 13 (1)*. Both these sections have the same definition of "land," to include "land covered with water and any right in, over or under land." It is not clear from this definition and the general context of these statutes—concerned mainly, so far as private landowners are concerned, with the width of roads and the construction of new roads—whether open land, unencumbered with buildings, only is here intended; for instance, section 13 of the 1935 Act empowers a highway authority to acquire any *land* "within 220 yards from the middle of any road the acquisition of which is, in their opinion, necessary for the purposes of the construction or improvement of the road or of preventing the erection of buildings detrimental to the view from the road." Probably there is insufficient indication here of a contrary intention to exclude the Interpretation Act definition, and land must therefore be held to include "buildings"; the term also clearly includes easements, by virtue of the definition, although in section 16 of the 1936 Act, dealing with the provision of parking places, it was considered necessary to repeat the phrase "including any right in, over or under land," after the term "land."

(v) *Housing Act, 1936, s. 188 (1)*. Here the definition reads, "'land' includes any right over land," it clearly being intended, it is submitted, that the Interpretation Act definition shall apply

(*b*) The powers of these bodies have now in most cases vested in a river board under the River Boards Act, 1948.

as appropriate. Considerable difficulty appears in practice in the application of this definition, however, in the fasciculus of clauses in Part V dealing with the acquisition and disposal of land for the purposes of that Part, *i.e.*, sections 71 to 82 (*c*). Section 73, as amended by the Housing Act, 1949, empowers a local housing authority to acquire "any land, including any houses or other buildings thereon, as a site for the erection of houses," and also (*inter alia*) to acquire "land for the purpose of the lease or sale of the land, under the powers conferred by this Act, with a view to the erection thereon of houses by persons other than the local authority." It is clear here, at least, that "land" in this section means land unencumbered with buildings, but includes easements, rights of way, etc., which the local authority may require for the purpose of developing a new housing estate.

Section 74 goes on to describe how "land" is to be "acquired" (*d*), namely, either by agreement or compulsorily with the approval of the Minister. A power to acquire, such as that given by section 73, must surely be sufficient of itself to authorise acquisition by agreement, and to this extent the powers of section 74 are, it is submitted, superfluous; but an express power is obviously necessary as a basis for a compulsory acquisition, and the question therefore arises whether the use of the term "land" *simpliciter* in section 74 is adequate to confer a power to acquire compulsorily land *and* buildings. In practice, many compulsory purchase orders have been confirmed by the Minister under this provision, and acted on by the local authority, for the acquisition of an estate with, possibly, a principal mansion house and a few cottages, for the purposes of development under Part V of the Act. In at least two decided cases, such orders have been examined by the courts and confirmed, although in neither case has this point been raised or, apparently, even discussed (*e*). Section 79 empowers the local housing authority to sell or lease land which has been acquired or appropriated for the purposes of Part V of the Act, provided they obtain the consent of the Minister of Housing and Local Government. It is understood that the Ministry take the view that this section does not empower an authority to lease buildings, such as shops erected by them on a housing estate,

(*c*) These sections have a separate heading to themselves, "General powers and duties of local authorities."

(*d*) The word "acquire" has itself no special definition in the Act, nor has it any peculiar meaning in law. Local housing authorities are empowered to accept donations of land or other property by the Housing Act, 1936, s. 150.

(*e*) See *Uttoxeter U.D.C.* v. *Clark* [1952] 1 All E.R. 1318, and *Attridge* v. *L.C.C.* [1954] 2 All E.R. 444.

as the section refers only to "land" (*f*); this may well be so, but the interpretation does not, it is submitted, logically agree with the interpretation of section 74 above discussed.

(vi) *Town and Country Planning Act, 1947, s. 119 (1).* This section provides that "'land' means any corporeal hereditament, including a building as defined by this section (*g*), and in relation to the acquisition of land under Part IV of this Act includes any interest or right in or over land." The first part of this definition has at least the merit of originality, but what it gains thereby it loses in clarity, and it should also be noted that by the use of the introductory word "means," the Interpretation Act definition has been effectively excluded. Presumably, land covered with water is not within the definition (*h*), and by the reference to corporeal hereditaments, the definition shuts out all estates and interests in land—quite understandably so in an Act as concerned with the physical concept of land as this, the principal statute on town and country planning. In cases falling under Part IV of the Act, "land" includes easements, such as rights of way and rights of support, but owing to the restricted application of the extended definition, difficulties may arise in cases of the acquisition of easements, especially in connection with the assessment of compensation, where other Parts of the Act have to be applied on a compulsory acquisition (*i*).

The definition in the 1947 Act applies to the Town and Country Planning Act, 1954 (*j*), but it is also therein provided that "'interest in land' means only an interest in fee simple or a tenancy" (see s. 69 (1)). It is incidentally of interest that the word "interest" is here used, and not "estate," thereby suggesting that for the purposes of the 1954 Act an equitable fee simple is as much an interest in land as is a legal estate.

The National Parks and Access to the Countryside Act, 1949, regarded for some purposes as part of the town and country

(*f*) The point is not, of course, of very great importance to the local authority, as they can use the equivalent powers of section 164 of the Local Government Act, 1933, for the purpose.

(*g*) "'Building' includes any structure or erection and any part of a building as so defined, but does not include plant or machinery comprised in a building." "Structure" and "erection" are both words of wide connotation, and therefore the effect of including "building" as so defined within the definition of "land" is to bring that term nearer to the ordinary common law and Interpretation Act definition than at first appears.

(*h*) It was considered necessary to specify "land covered with water," as falling within the definition, in the National Parks and Access to the Countryside Act, 1949 (see below), and in several other statutes.

(*i*) See an article by the present writer on "Rights of Support," (1948) 12 Conv.(N.S.) 280, at p. 288.

(*j*) See s. 69 (2) thereof.

planning legislation, has its own definition of "land"; by section 114 (1) it is provided that "'land' includes land covered by water," and that, except where the context otherwise requires, *other* expressions are to have the same meanings as in the Act of 1947. In this case, therefore, the 1947 Act meaning is presumably shut out, and an extended meaning is thereby given to "land" more like that applicable to the other statutes we have been considering, as the Interpretation Act definition is not to be excluded, nor is the ordinary common law meaning.

(vii) *Civil Aviation Act, 1949, s. 63 (1)*, provides that "'land' includes any estate or interest in land and any easement, but this definition shall not affect the construction of the provisions of sections 19 and 23 of this Act as to the acquisition of land"; in section 19, it is provided that "'land' includes any right in or over land," and in section 23 in one place, "land" appears without extension, in subsection (2), the expression appears "any land, any estate or other interest in land, or any right in or in relation to land," while subsection (3) has a special definition, to the effect that "'land' includes any estate or other interest in land and any easement." Yet again, in subsection (7) of section 23, "land" includes a variety of rights over land, such as maintenance of apparatus, etc. In all these cases, it seems that the Interpretation Act definition also will apply, so that "land" will include buildings erected thereon.

(viii) *Coast Protection Act, 1949, s. 49 (1)*, provides that for the purposes of this Act "'land' includes land covered by water." It is interesting to realise that a coast protection charge which may be levied on any "contributory land" may be levied on a piece of land covered by water, such as a fresh-water lake which may be found near the sea shore in several parts of the country, but the definition should not cause any real difficulty in its application to this Act, and it seems reasonably clear that the Interpretation Act definition will apply, and that "land" includes buildings.

Conclusion

This review of a few definitions of this common word "land" has suggested the following general observations:

(1) "Land" may mean different things in different statutes, and even in different sections of the same statute;

(2) Generally speaking, "land" does not include estates or interests in land, unless it is so expressly provided in the particular statute;

(3) The Interpretation Act definition must be taken into account in any particular context, as well as any special definition, unless it is expressly excluded;

(4) Finally, it should be remembered that statutes of the kind here considered, which invariably involve an interference by an administrative authority with the liberty of the subject in the public interest, are viewed restrictively by the courts and only powers which clearly come within the language of the enabling statute will be held to have been conferred by the enactment (*k*). This general principle itself means that "land" will be construed restrictively, within the terms of any relevant definition.

And—if we may say so with respect—this examination has suggested that the draughtsmen of these administrative statutes do not always fully consider and legislate for the effect such provisions as the meaning of "land" have on conveyancing and the law of real property generally.

(*k*) See many cases referred to in Maxwell's *Interpretation of Statutes* (10th ed.), pp. 364 *et seq.*

ELECTION AND THE WILLS ACT, 1837

By Philip H. Pettit, m.a., Barrister-at-Law

Upjohn J. prefaced his judgment in *Re Edwards, deceased* (*a*) with the observation that the facts gave rise to the interesting question whether one of the parties was put to her election: it is the purpose of this comment to suggest, contrary to the decision of the court, that the law relating to wills prevents any case for election arising.

The facts of the case may be summarised as follows:—

A testatrix made her will on February 8, 1952, by which, after appointing an executor and giving certain specific and pecuniary legacies, she directed that No. 78, Albion Road, Hounslow, together with the residue of her real and personal estate should be sold and the proceeds divided equally between seven named relatives including her sister W. At some time after the date of her will (probably in May, 1952) the testatrix entered into an oral agreement with W. The terms of this agreement were that W should give up the tenancy of certain premises occupied by her and move, with her furniture, into two rooms in No. 78, Albion Road, where the testatrix was then living, and should undertake certain household duties for the testatrix. The consideration for this was that the testatrix should allow W to occupy the two rooms rent free during their joint lives, and would devise the whole of No. 78, Albion Road, to W by her will. On June 1, 1952, pursuant to that agreement W went into occupation of the two rooms and carried out her part of the bargain until the death of the testatrix on July 30, 1952. The testatrix had not effectively altered the provisions of her will already referred to (though she had attempted to do so), and, by an order of the court dated October 2, 1953, made at the suit of W, the oral agreement was declared valid and binding. No. 78, Albion Road, was subsequently conveyed to W by the personal representative of the testatrix, and the question before the court was whether W was entitled to keep No. 78, Albion Road, and also take her share in the residue, or whether she must elect (in which case it was conceded she had elected against the will). The effect of election against the will on the facts of the case, having regard to the relative values of No. 78, Albion Road, and the residue, was that W would have

(*a*) [1956] 3 W.L.R. 771; [1956] 3 All E.R. 526, noted *ante*, p. 70.

to give up the whole of her interest under the will on the ordinary principles of compensation applicable in cases of election.

On these facts, Upjohn J., as already indicated, came to the conclusion that W was called upon to elect. The *ratio* behind his decision appears from certain short passages towards the end of his judgment:—

> "Here, there is a will which speaks under section 24 of the Wills Act, 1837, of the property comprised in it at the death. By that will the testatrix has expressed the clearest possible intention to dispose of 78, Albion Road. Accordingly, . . . if [W] desires to accept a benefit in respect of some quite different property under that will, she must be prepared to adopt the whole contents of the instrument, conform to all its provisions, and renounce every right inconsistent with them . . . Since the Wills Act of 1837, all that has to be found is the disposition of the property of another who receives other benefits under the will (*b*)."

It will be convenient to make it clear at once that it is not sought to cast any doubt upon either of the general statements of the doctrine of election adopted by Upjohn J. earlier in his judgment, from Jarman on *Wills* (*c*) and from the speech of Lord Hatherley in *Cooper* v. *Cooper* (*d*) respectively. The question which is raised is whether the facts of the present case can be brought within what may, perhaps, be called the major premise of those statements: namely, in Jarman's statement, that "the testator has affected to dispose of property which is not his own"; or, as Lord Hatherley puts it, "it being found clearly and distinctly (for it must be clearly and distinctly found) that he has expressed his intention of disposing of what belongs to another."

The oral agreement between the testatrix and W must, of course, in the light of the order of the court of October 2, 1953, be treated as a valid and binding agreement: no point appears to have been taken upon the precise form of the agreement, which was not a contract of sale in the ordinary sense but a contract to leave specific property by will. There is ample authority, however, for saying that the court has power to order specific performance by compelling the personal representatives in such a case to convey the property to the other party to the contract (*e*) and it will

(*b*) [1956] 3 W.L.R., at p. 776; [1956] 3 All E.R., at p. 500.
(*c*) (8th ed.), Vol. 1, p. 545.
(*d*) (1874) L.R. 7 H.L. 53.
(*e*) See, *e.g.*, *Loffus* v. *Maw* (1862) 3 Giff. 592 (disapproved on other grounds in *Maddison* v. *Alderson* (1883) 8 App.Cas. 467); *Coles* v. *Pilkington* (1874) L.R. 19 Eq. 174; *Alderson* v. *Maddison* (1880) 5 Ex.D. 293 (reversed on other grounds by H. L. *sub nom. Maddison* v. *Alderson* (1883) 8 App.Cas. 467); *Synge* v. *Synge* [1894] 1 Q.B. 466.

be here assumed, as it was assumed by the court, that the effect of the agreement between the testatrix and W was to cause a conversion of 78, Albion Road.

Revocation by alteration of estate

Counsel for W apparently submitted that the effect of the agreement was to adeem the gift in the will, and that ademption is only another form of revocation. It is our submission that the true view of the matter is that the facts caused a revocation of the devise by alteration of estate, a state of affairs commonly referred to as a species of ademption though the term seems originally to have been, and even now is perhaps more properly, restricted to personal estate (*f*). It will be remembered that before the Wills Act, 1837, came into operation a change in the nature or quality of an estate was a frequent ground of failure of devises (*g*) even a slight alteration being regarded as a revocation of the devise. It is clear that a sale and conveyance of property being the maximum alteration of an estate possible, was an effective revocation of a devise of such property, and, under the doctrine of conversion, a binding contract had the same effect. Section 23 of the Wills Act provided that no conveyance or other act made or done subsequently to the execution of a will of, or relating to, any real or personal estate therein comprised, except an act by which such will should be revoked as therein provided, should prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator should have power to dispose of by will at the time of his death.

In several cases after the passing of the Act it was argued that sections 23 and 20 (which provides that no will shall be revoked save in manner specified in the Act) read together had totally destroyed the doctrine of revocation by alteration of estate. A series of cases, however, appears to have established that where a testator devises an estate and subsequently sells and conveys it prior to his death, or enters into a contract of which equity would decree specific performance, so that under the doctrine of conversion the estate has already been disposed of in contemplation of equity, in either case the devise is revoked (save, in the latter case, as to the bare legal estate). The earliest reported case seems to be *Moor* v. *Raisbeck* (*h*), which decision was approved by Lindley L.J., giving the judgment of the Court of Appeal, in

(*f*) It may be noted that the doctrine of the ademption of legacies by portions is restricted to legacies as distinguished from devises: *Davis* v. *Boucher* (1839) 3 Y. & Colt. 397.

(*g*) See, *e.g.*, the cases collected in Viner's *Abridgement*, Vol. VIII, p. 143.

(*h*) (1841) 12 Sim. 123.

Re Clowes (*i*), though certain dicta of Sir L. Shadwell V.-C. were doubted. Lord Langdale M.R. came to the same conclusion in *Farrar* v. *Earl of Winterton* (*j*), as did Jessel M.R. in *Blake* v. *Blake* (*k*), where he quoted with approval from Shelford's *Real Property Statutes* (*l*) the statement that section 23 of the Wills Act "applies to cases where testators, after having devised their estates, make conveyances of them which are to have the same effect as fines or recoveries or where they mortgage the devised estates in fee and afterwards take a reconveyance of them to themselves and a trustee to bar dower but it does not apply to cases where the thing meant to be given is gone," saying, "I take it that this is the true view of the 23rd section." Later in his judgment the Master of the Rolls said (*m*) "The character of the thing given is changed by the act of the testator, and he has thereby revoked his will by destroying or preventing the continued existence of the subject-matter of the gift." It seems clear that where a devise has been revoked, whether expressly or by alteration of estate, it is impossible to say that there is any longer an intention to dispose of the subject of the revoked devise.

If support were necessary for the view above stated, it could be found in the authorities for the rule recently restated by Harman J. in these terms (*n*): "It is old law, at least as old as Lord Hardwicke L.C., that a republication cannot operate to make good a legacy once adeemed: see the judgment in *Drinkwater* v. *Falconer* (*o*), see also *Powys* v. *Mansfield* (*p*) (Lord Cottenham's decision)." The two cases cited by Harman J. are decisions prior to the Wills Act, but that Act did not affect the position. For instance, in *Hopwood* v. *Hopwood* (*q*) the statement of Lord Cottenham in *Powys* v. *Mansfield* (*r*) was adopted, namely that "the codicil can only act upon the will as it existed at the time, and, at the time, the legacy revoked, adeemed or satisfied formed no part of it." Reference may also be made to *Ford* v. *De Pontes* (*s*) where, in relation to land, Sir John Romilly M.R. expressly referred to "revocation by ademption."

(*i*) [1893] 1 Ch. 214.
(*j*) (1842) 5 Beav. 1, followed in *Re Clowes* (*supra*).
(*k*) (1880) 15 Ch.D. 481, following *Gale* v. *Gale* (1856) 21 Beav. 349.
(*l*) (8th ed.), p. 520.
(*m*) At p. 489. This statement was cited, and the decisions in *Blake* v. *Blake* and *Gale* v. *Gale* (*supra*) were approved, by the House of Lords in *Beddington* v. *Bauman* [1903] A.C. 13, affirming the Court of Appeal decision reported as *Re Moses* [1902] 1 Ch. 100.
(*n*) *Re Galway's Will Trusts* [1950] Ch. 1, at p. 9.
(*o*) (1755) 2 Ves.Sen. 622.
(*p*) (1836) 3 My. & Cr. 359.
(*q*) (1859) 7 H.L.C. 728.
(*r*) (1836) 3 My. & Cr., at p. 376.
(*s*) (1861) 30 Beav. 572.

Wills Act, 1837, *s.* 24

We must now consider section 24 of the Wills Act upon which Upjohn J. relied. This section provides:

> "Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

It is clear that if our first submission is correct and the will is to be read as if the gift "had been expunged from it" (*t*), the relevant estate is no longer to be regarded as comprised in the will and section 24 can have no application. Apart from this, however, it is submitted that the specific nature of the devise in *Re Edwards* is sufficient evidence of a contrary intention to take the case outside section 24. The principle was put succinctly by Clauson J. in *Re Sikes* (*u*), where a testatrix who owned a piano at the date of her will made a specific bequest thereof. She subsequently sold that piano and shortly afterwards purchased another. The judgment can be set out in full:

> "I am of opinion that when making the bequest of 'my piano,' the testatrix referred to a particular thing (to borrow the language used by Wood V.-C. in *Goodlad* v. *Burnett* (*v*)), and intended to give the particular piano then in her possession and no other. That, in my judgment, constitutes a contrary intention sufficient to take the bequest out of the operation of section 24 of the Wills Act, 1837, with the result that the piano, which she possessed at her death did not pass under the bequest of 'my piano'."

It is true that Malins V.-C. in *Castle* v. *Fox* (*w*), expressed a decided opinion that where a testator, owning a house in Grosvenor Square, devised "my house in Grosvenor Square" and subsequently sold that house and purchased another in the same square, the newly purchased house would pass under the devise by virtue of section 24. He appears, however, not to have regarded the devise of "my house in Grosvenor Square" as a specific devise, but rather as a generic gift, and his view has not, it is believed, received judicial support or, indeed, support from text-book writers. The weight of authority seems strongly to support the

(*t*) See *Hopwood* v. *Hopwood* (1859) 7 H.L.C. 728, *per* Lord Kingsdown, at p. 747. This case is concerned with a different species of ademption, though on this point it is submitted the effect is the same.

(*u*) [1927] 1 Ch. 364.

(*v*) (1855) 1 K. & J. 341.

(*w*) (1871) 11 Eq. 542.

decision in *Re Sikes* (*x*): it will suffice to refer to *Re Evans* (*y*), where Joyce J. regarded an illustration exactly analogous to that given by Malins V.-C. as an obvious case to which section 24 did not apply, and expressed the general principle thus,

> " where there is such a particularity in the description of the subject of a gift as to shew that it was some object in existence at the date of the will that was intended to pass, it is considered that there is sufficient evidence of a contrary intention to exclude the application of the provisions of section 24 ";

and to *Re Gibson* (*z*) where Wood V.-C. said:

> " as to the application of section 24 of the Wills Act, when you find a mere specific thing, incapable of increase or diminution, in existence at the date of the will, but not in existence at the time of the testator's death, there is a sufficient indication upon the will of the ' contrary intention ' to which section 24 refers, to prevent the operation of the rule which makes the will speak from the death of the testator."

To put this second point shortly, it is submitted, with respect, that the court in *Re Edwards* (*a*) failed to heed the observation of Lindley L.J. in *Re Portal and Lamb* (*b*), that section 24 of the Wills Act " does not say that we are to construe whatever a man says in his will as if it were made on the day of his death."

Satisfaction and ademption distinguished

It remains to comment on the reference in the judgment in *Re Edwards* to counsel's reliance on a passage from Jarman on *Wills* (*c*) discussing the distinction between satisfaction and ademption. Two points can be made: in the first place, as is stated on the preceding page of Jarman, " there are two kinds of ademption: the one where the testator gives a specific chattel or fund, and the legacy fails because the chattel or fund has ceased to be part of the testator's assets; the other, where the testator gives a general legacy, and the legacy is held not to be payable because the intended bounty has already been satisfied by the testator." Jarman proceeds to discuss the latter kind of ademption in the passage cited, but this kind of ademption could not possibly be regarded as arising in *Re Edwards*: any ademption in *Re*

(*x*) *Supra.*
(*y*) [1909] 1 Ch. 784, followed in *Re Davies* [1925] 1 Ch. 642.
(*z*) (1866) 2 Eq. 669. See also *Sidney* v. *Sidney* (1873) 17 Eq. 65.
(*a*) *Supra.*
(*b*) (1885) 30 Ch.D. 50, at p. 55.
(*c*) (8th ed.), Vol. 2, p. 1137.

Edwards must be of the former kind. Secondly, the "election" referred to is something quite different from the equitable doctrine of election under consideration. As appears from the quotation from Lord Romilly's judgment in *Lord Chichester* v. *Coventry* (*d*) immediately preceding the passage cited in *Re Edwards*, "election" in this context means little more than "choice": it is relevant in considering the distinction between the ademption of legacies by portions and the satisfaction of portion debts by legacies. In the first case, that of ademption, the will being a revocable instrument, the portion is treated as a revocation of the legacy and the child is bound to take the portion and cannot choose the legacy in preference to the portion: in the second case, that of satisfaction, the father cannot alter the obligation he has imposed upon himself in undertaking the portion debt, and if he gives a legacy which is properly regarded as being in satisfaction of the portion debt, the child has the right to "elect," *i.e.*, he can choose between insisting upon his rights as a portion creditor, when he will have to give up the legacy either wholly or *pro tanto*, and giving up his legal claim to the portion debt and taking the legacy in full.

Summary

Apart from the criticisms contained in the preceding paragraph, the main submissions of this comment may be summarised as follows:

A. The agreement between the testatrix and W (being an agreement of which equity would decree specific performance) brought into play the doctrine of conversion as a result of which the devise of 78, Albion Road, was revoked by alteration of estate. This result is unaffected by the provisions of section 23 of the Wills Act. The devise of 78, Albion Road, must be treated as expunged from the will of the testatrix which, consequently, cannot be said to express an intention to dispose of 78, Albion Road.

B. Section 24 of the Wills Act does not operate to make the will speak from death where any contrary intention appears. The specific nature of the devise coupled with the non-existence of the devised property as a part of the estate of the testatrix, (under the doctrine of conversion) prevent this section from applying. The consequence again is that the will cannot be said to show an intention to dispose of 78, Albion Road.

(*d*) (1867) L.R. 2 H.L. 71, at p. 90.

On either submission it must follow that there is no case for election since what has been called the major premise is lacking. On the assumption that W gave full value for 78, Albion Road, this would have given an equitable result as is, indeed, stated in the judgment. There seems no place here for equity, any more than law to inquire into the adequacy of the consideration, and the fact that W, by reason of the early death of the testatrix, would have appeared in the events which have since happened, to have made a good bargain, must surely be irrelevant.

NOTES OF RECENT CASES

1. *REAL PROPERTY AND CONVEYANCING*

By F. R. Crane, LL.B., Solicitor

Halsall v. *Brizell* [1957] 2 W.L.R. 123;
[1957] 1 All E.R. 371 (Ch.D.)

Covenants running with land—positive covenants—contribution to upkeep of roads, etc.—enforceability—benefit and burden of deed.—This decision may prove to be a further example of a limited line of cases, or the first step in a fruitful development of the law concerning positive covenants affecting land.

In 1857 an estate of forty acres called Crossington Park, Liverpool, was sold by two vendors in 174 building plots. The vendors and all the purchasers entered into a separate deed whereby the vendors covenanted to hold the roads, sewers, promenade and seawall, all of which remained vested in them, upon trust for the purchasers, and the latter in return covenanted, *inter alia*, to contribute to the upkeep of the said roads, etc. All the covenants were expressed to enure for and against successors in title. The deed also contained particular provisions concerning the payment of calls and a power to distrain. The plaintiffs, the present trustees, and proprietors of the roads, etc., had levied calls against the defendants, the present owners of one of the plots, on the basis of an additional assessment because the house was sublet in parts. Apparently there had been no previous disputes over payment, and, indeed, the defendants were willing to pay if calls were assessed by reference to plots rather than to their user. Upjohn J. held:—(1) The burden of the positive covenant to pay did not run with the land (*Austerberry* v. *Corporation of Oldham* (1885) 29 Ch.D. 750). (2) The provisions for enforcing payment infringed the Rule against Perpetuities and the power to distrain was invalid because the covenant did not create rentcharges to which it could be annexed. (3) *But* "it is conceded that it is ancient law that a man cannot take benefit under a deed without subscribing to the obligations thereunder," and consequently the defendants were bound because they could not "take advantage of the trusts concerning the user of the roads [etc.] contained in the deed and the other benefits created by it without undertaking the obligations thereunder" ([1957] 2 W.L.R. at pp. 132, 133; [1957] 1 All E.R. at p. 377). The defendants had no rights of way, etc., except by virtue of the deed of 1857. (4) Finally, the new basis of assessment was invalid.

It will be observed that this application of the principle "*qui sentit commodum sentire debet et onus*" effectively by-passed both the decision in *Austerberry* v. *Corporation of Oldham* (*ante*) and the Rule against Perpetuities. For authority Upjohn J. cited only a

brief remark by Cozens-Hardy M.R. during argument in *Elliston* v. *Reacher* [1908] 2 Ch. 665, and, with respect, a full examination of the limits of the principle would have been helpful. Some points may be noted here.

1. The covenant to hold the roads, etc., on trust for the various purchasers probably created easements in their favour (see Gale on *Easements*, 12th ed., at pp. 73–74). In that event the case is comparable with *Re Ellenborough Park* [1956] Ch. 131 (cited in argument), where it was accepted that the easements to use the park were subject to the condition of contributing to upkeep (at p. 169), though counsel had conceded that a positive covenant to pay contributions did not run (at p. 154). In the present writer's note on *Re Ellenborough Park* (*ante*, Vol. 20, p. 61) it was suggested that such a condition might prevent the easements being legal within the Law of Property Act, 1925, s. 1 (2) (a), as not being equivalent to a fee simple absolute in possession, an alternative, and probably better, conclusion seems now to be that such easements are wholly effective and carry with them a liability to contribution. (See " Positive Covenants in Conveyances " by E. H. Scamell, *ante*, Vol. 18 at pp. 561–562; " Sale of Freehold Flats " by E. F. George, *ante*, Vol. 19 at p. 10, where the position is succinctly summarised, " no payments, no easements; and no easements, no access.") The law would then be comparable with that of rentcharges; the burden of a covenant to pay does not run with a rentcharge but the terre-tenant can always be sued in debt (*Grant* v. *Edmondson* [1931] 1 Ch. 1; *Thomas* v. *Sylvester* (1873) L.R. 8 Q.B. 638).
2. Provisions that mine-owners shall pay compensation for letting down the surface have been enforced without privity of contract or estate in a number of cases, collected and discussed in Preston and Newsom, *Restrictive Covenants Affecting Freehold Land*, at pp. 65–68 (Excursus A). The learned authors at pp. 68–69 suggest three possible principles to explain the decisions:—(a) covenants impliedly restrictive—*i.e.*, " not to mine unless . . ."; they compare a covenant not to build unless plans are approved by the vendor's surveyor (see pp. 55–56), which, though involving expense, is accepted as restrictive; (b) an exception at law to the decision in *Austerberry* v. *Corporation of Oldham*, *ante*; and (c) the law of tort, in that letting down the surface is prima facie tortious and can only be excused by pleading the grant which provides for compensation. Point (b) is clearly relevant to the instant case, and also point (c) for the defendants could only use the roads, etc., by virtue of the deed of 1851.
3. The principal case for point (b) is *Aspden* v. *Seddon* (1875) 1 Ex.D. 496, where the decision enforcing the payment of compensation was rested fairly and squarely—even emphatically—on the principle that he who takes the benefit of a deed must accept the burden. The learned authors of Preston and Newsom suggest (p. 69) that the court in *Aspden* v. *Seddon* may have had " an incomplete grasp of the rule definitively laid down ten years later in *Austerberry* v. *Oldham Corporation*."

In the latter case *Aspden* v. *Seddon* was cited in argument (29 Ch.D. at p. 764) but not referred to in the judgments; Cotton and Lindley L.JJ. did however explain *Morland* v. *Cook* (1868) L.R. 6 Eq. 252 on the ground that there covenants to repair a sea-wall created rentcharges. (See the articles by Mr. Scamell and Mr. George above referred to, and Form 22, *ante*, Vol. 20 at p. 799.) In the instant case, as noted above, Upjohn J. held that no rentcharges were created.

4. Assuming that *Austerberry* v. *Corporation of Oldham* can be by-passed, some limits may be suggested to be operation of the principle that he who accepts the benefit of a deed must also undertake the burden. It seems to apply so as to make enforceable, first, payment of compensation for mining subsidences (see cases cited in Preston and Newsom, *ante*), and, secondly, contributions for the upkeep of roads, parks, etc., over which easements have been granted (*Re Ellenborough Park*, *ante*, and the present decision). The mere conveyance of a fee simple to a purchaser who enters into positive covenants is insufficient (*Austerberry* v. *Corporation of Oldham*, *ante*). Whether the performance of other positive covenants can be annexed to the grant of easements would seem more doubtful (though this is relied upon in a precedent—Form 1, *ante*, Vol. 20 at p. 651), while the case of mutual positive covenants between vendor and purchaser remains to be considered. Clearly a trust deed of the type here considered by Upjohn J. is likely to prove a useful conveyancing device where freehold flats are transferred. The fact that the arrangement worked satisfactorily for over 100 years indicates that this new development, if it matures, may be welcome.

Lee v. *Barney* [1957] 2 W.L.R. 245;
[1957] 1 All E.R. 191 (C.A.)

Registered land—boundaries—discrepancy between plan on transfer and on land certificate—Land Registration Act, 1925, *ss.* 19, 69, 76; *Land Registration Rules*, 1925, *rr.* 272–285.—The plaintiff and defendant bought adjoining plots of registered land from the same vendor. The common boundary between the two plots, as shown in the contract with, and on the transfer to, the defendant and as pointed out to him on the ground, was not straight but contained a kink. The land certificate eventually issued to the defendant, however, showed the boundary as straight, thereby apparently giving him—as compared with the transfer—an extra triangular piece of land, ten feet across at its widest and tapering to a point at either end. The defendant, relying on the land certificate, built a house, part of which, with some concrete paving, rested on the triangle. The plaintiff claimed a declaration, removal of the paving (but not the house) and damages. The Court of Appeal (Lord Evershed M.R., Birkett and Romer L.JJ.), affirming an unreported decision of Jenkins

L.J. sitting in the Chancery Division, held that this was a dispute as to boundaries and not as to property, with the result that the plaintiff succeeded because the plan on a land certificate (unless there is a note that the boundaries are fixed—L.R.R. 276, 277) denotes only the general and not precise boundaries (L.R.A., 1925, s. 76; L.R.R. 272–285). The Master of the Rolls, who gave the principal judgment, said: " . . . there is no doubt that the certificate purported to give him [the plaintiff], and gives him, the right property. What, on the evidence, it has failed to do is to indicate the boundaries with sufficient correctness and precision " ([1957] 2 W.L.R. at p. 252; [1957] 1 All E.R. at p. 195). He further held that sections 19 and 69 of the Land Registration Act, providing respectively that transfers must be completed by registration, and that a proprietor has vested in him the land described in the land certificate, were directed only to bringing registered land into the general 1925 scheme, and were not here relevant. Lord Evershed also relied upon the printed paraphrase of rule 278 that appears on the cover to land certificates, and a stamped note on this one to the effect that the boundaries had been plotted from the transfer and were subject to revision after the erection of fences (see L.R.R. 284).

The Court of Appeal has therefore put a wide interpretation on the word " boundaries," for the frontage of the defendant's plot was only 42 feet, so the difference was, in the words of the Master of the Rolls, " not negligible." The implications of the decision are, it is submitted, somewhat disturbing, not least to friends of registered conveyancing. The defendant in the present case may or may not be thought to have acted unreasonably, having regard to his actual knowledge. A subsequent purchaser would, however, be in a more difficult position, because he does not normally see the earlier transfer but only the filed plan on the register (L.R.A., s. 110). If he purchased " the land comprised in the title above referred to," would he be entitled, on discovering the existence of the kink, either to rescission before completion for substantial misdescription as in *Flight* v. *Booth* (1834) 1 Bing.N.C. 370 (see Emmet on *Title*, 14th ed., Vol. 1, pp. 84–88) or to damages after completion for breach of the usual covenants for title? What is now the duty of solicitors acting for purchasers, of registered land as regards the checking of parcels?

Since the transfer to the defendant showed the kink, the trouble would not have arisen if the title had been unregistered. Therefore it is submitted, with respect, that the case represents a breakdown in the operation of the machinery of registered conveyancing. A layman might reasonably expect the land certificate to be correct as regards a boundary drawn solely on the vendor's land. The solution to the difficulties illustrated by the present decision appears to lie in the use of more precise plans, giving dimensions which show the exact site and measurement of the relevant land, together with fencing before transfer wherever possible. A more general point, indirectly raised, is that plans on the common scale of 1/1,250, representing one inch to approximately 104 feet, may not be adequate where small distances are important.

Truckell v. *Stock* [1957] 1 W.L.R. 161;
[1957] 1 All E.R. 74 (C.A.)

Conveyance—construction of parcels clause—boundaries—projection of footings and eaves over boundary shown on plan.—When construing the parcels in a conveyance the court seeks to find a clear and definite description of the property conveyed; once this has been done inconsistent descriptions can be rejected because *falsa demonstratio non nocet* (*Llewellyn* v. *Earl of Jersey* (1843) 11 M. & W. 183; *Eastwood* v. *Ashton* [1915] A.C. 900). Applying this principle the Court of Appeal (Denning and Hodson L.JJ. and Ormerod J.) held that a conveyance to the plaintiff of "all that land, dwelling-house, office, garage, outbuildings and premises . . . hereinafter mentioned and delineated and coloured pink and red on the plan attached hereto," was effective to pass eaves and brick footings which jutted out beyond the boundary shown on the plan, though not the vertical column of air space between—following, on the latter point, *Corbett* v. *Hill* (1870) L.R. 9 Eq. 671. Consequently the defendant, a successor in title to the vendor to the plaintiff, had committed trespass by building a wall on the brick footings. Hodson L.J., analysing the parcels, said "I do not accept that there is any *falsa demonstratio*, either in the conveyance itself or in the plan; the two seem to me to be quite consistent with one another if one remembers that the plan is a ground plan and only shows the boundary of the plaintiff's property on the ground; whereas the conveyance of the house and parcels show the actual thing conveyed. . . . So that although the ground plan . . . would control the ownership of the air above, it does not in the least prevent the plaintiff owning the parts of his house which protrude over the line marked on the ground plan" ([1957] 1 W.L.R. at pp. 164–165; [1957] 1 All E.R. at p. 77).

So far as the reports cited above show, the court's attention was not drawn to *Laybourne* v. *Gridley* [1892] 2 Ch. 53, where a conveyance to A of "all that piece or parcel of land . . . together with the messuage and premises thereon . . . in the occupation of X [a lessee] and called . . . the Outrigger, more particularly delineated on the map or plan drawn on these presents," was held not to pass that part of a loft (wholly occupied as part of the Outrigger) which projected beyond the boundary on the plan.

The principle stated at the beginning of this note is so wide, and conveyances so individual, that precedents can be of only limited value. Yet comparison of the two cases above, with some others, suggests a possible gloss in relation to projections. If the parcels read, in essence, "all that piece or parcel of land, together with the building thereon, delineated on the plan," then projections seem unlikely to pass (*Laybourne* v. *Gridley*, *ante*; *Wallington* v. *Townsend* [1939] Ch. 588; [1939] 2 All E.R. 225, especially the latter report). If, however, the parcels read, in essence, "all that messuage or dwelling-house, with the gardens, etc., delineated on the plan," projections seem likely to pass (*Truckell* v. *Stock* here under note; *Corbett* v. *Hill*, *ante*; *Fox* v. *Clarke* (1874) L.R. 9 Q.B. 565; *Willes* v. *Watney* (1881) 51 L.J.Ch. 181). Precedents of both types appear in the books—*e.g.*, Key and Elphinstone's *Precedents in Conveyancing*,

15th ed., Vol. 1, pp. 582 *et seq.* Of course projections should be dealt with specifically where they are known to exist.

Whether the general words implied by the Law of Property Act, 1925, s. 60 (1) and (2), are sufficient to carry physical projections as well as incorporeal rights is a further point which seems to be still open to consideration (see *Willes* v. *Watney, ante*).

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2. *TRUSTS*

By F. R. Crane, ll.b., Solicitor

Re Powell-Cotton's Resettlement [1957] 2 W.L.R. 328; [1957] 1 All E.R. 404 (Ch.D.)

Settlement—investment clause—meaning of "ordinary preferred stock or shares."—Roxburgh J. here held that the phrase "ordinary preferred stock or shares," in an investment clause (dated 1940) was equivalent to "preferred ordinary stock," the latter being a term and type of stock, well known on the Stock Exchange. Consequently, the trustees were authorised to invest in "a sub-class of ordinary stock which has some preference or priority over another sub-class of ordinary stock" ([1957] 2 W.L.R. at p. 331; [1957] 1 All E.R. at p. 406). The elucidation of this particular phrase may be useful because, as the learned judge remarked, it used to appear in standard precedents, and so may have been incorporated into a number of settlements.

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3. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

Re Dawson's Will Trusts [1957] 1 W.L.R. 391; [1957] 1 All E.R. 177

Charitable institution—merger—prevention of lapse.—In this case the testator made his will in February, 1955, and died in May, 1955. He left a share of the proceeds of sale of residue for the general purposes of the Church Association of 13–14, Buckingham St., Strand. In 1950 the Church Association was informally amalgamated with another body and the resulting body was the Church Society, whose offices were not in Buckingham Street. It was clear that both the Church Association and the Church Society were charitable bodies, but it was argued that the gift to the first lapsed as the original body no longer existed. Vaisey J., however, held that there was no lapse. There seems here to have been such a general charitable intention as to prevent the bequest being lost to charity, *e.g.*, the reference to

" purposes " rather than merely to the institution, and the fact that this was a residuary bequest. It has been held that a change of address is not important in such cases (*Re Wedgwood* [1914] 2 Ch. 245). It was undisputed that the purposes of the Church Association had been charitable in themselves. The learned judge held in favour of the Church Society on two grounds. In his opinion the Church Association might still be identified in the new Church Society and might take the bequest although there had been no gift in the will to the other body with which it had amalgamated. This seems consistent with *Re Joy* (1888) 60 L.T. 175 and *Re Pritt* (1915) 85 L.J.Ch. 166, on which the present decision is based, though in *Re Pritt* the court insisted on evidence that the testatrix had known about the amalgamation before her death, and in *Re Joy* there were gifts to both " halves " of the new body, so these cases might have been distinguished. Alternatively, the learned judge considered that the Church Society might properly prepare a scheme for approval of the court or Charity Commissioners or with the help of the Attorney-General.

(Theobald 354)

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4. *WILLS*

By A. Kiralfy, Barrister-at-Law

Re Gouk [1957] 1 All E.R. 469

Words of limitation—absolute gift and purported gift over.—In this case the testatrix left all the residue of her estate " to F, and thereafter to her issue." Danckwerts J. held that F took absolutely. The general rule is that an initially absolute gift may not be cut down by a repugnant disposition over. The learned judge declined to use the latter part of the sentence in order to cut down the former. He followed *Byng* v. *Lord Strafford* (1842) 5 Beav. 558, though there the gift was one of several, and the testator had expressly cut down the other gifts to life interests, so that he " knew " about such methods of limitation. He also followed *Re Percy* (1883) 24 Ch.D. 616, which is a strong authority, since there a pecuniary legacy was left to Anne " and afterwards " to a different person as residuary legatee, and Anne took the capital of the legacy. A clear reference to passing on death would have been different, since that would have made it clear that the prior limitation was for life. The present case skates over the borders of interesting problems of the law of property, but avoids them as a matter of construction of the will. As the issue in the event took no interest, Law of Property Act, 1925, s. 131, did not have to be considered. The strict rules of limitation of an entail under section 130 (2) did not apply but would have yielded a similar result to the decision on construction.

(Theobald 551)

Hurley v. *Simmonds* (1956) 107 L.J. 60

Leasehold—implied assent—evidence.—A contractual yearly tenant died intestate. Had he appointed an executor his tenancy would have vested in him. As it was the tenancy vested in the President of the Probate Division until his widow obtained a grant of administration. During this period the widow was not the tenant (*cf.* Williams on *Executors*, 154). She continued to occupy the premises and paid rent, but her husband's name remained on the rentbook. She never made any express assent to herself after receiving the grant. On her death intestate her daughter obtained a grant of administration to the mother. The learned county court judge held that the landlord was entitled to possession. The widow must be treated as having remained in occupation under the special protection of section 12 of the Rent Restriction Act of 1920 since the tenancy was originally vested in the court. The judge refused to treat the grant of administration as relating back to the death of the original tenant. He agreed that an implied assent by a personal representative to himself as a beneficiary escapes the requirements about writing in section 36 of the Administration of Estates Act, 1925, but there must be some evidence of an assent. (Such an assent, had there been any, would have related back to the original tenant's death, under section 26 (2).) Here there was no evidence showing that the widow had ever ceased to act as administratrix and begun to act as beneficial tenant. The result seems logical but somewhat unfortunate. The protection extended to widows of contractual tenants by the House of Lords in *Moodie* v. *Hosegood* [1952] A.C. 61 was here used to defeat the implication of an assent which might otherwise have been more strongly arguable.

(Williams on *Executors*, 771, 773)

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5. *LANDLORD AND TENANT CASES*

By D. Macintyre, m.a., Barrister-at-Law

Cadogan and another v. *Henthorne and others*
[1957] 1 W.L.R. 1; [1956] 3 All E.R. 851

Rent Acts—premises within the Acts—Housing Repairs and Rents Act, 1954, s. 41.—The decision in this case turned upon the true construction of section 41 of the Housing Repairs and Rents Act, 1954, which provides that, "where a dwelling-house to which the Act of 1920 applies . . . forms part of premises, not being such a dwelling-house, which have been let as a whole on a superior letting, then from the coming to an end of the superior letting the operation of the Rent Acts in relation to the sublet part shall be the same as if in lieu of the superior letting there had been separate lettings of the sublet part and the remainder of the premises, for the like purposes as under the superior letting, and at rents equal to the just proportion of the rent under the superior letting." But to whom is

the notional subletting of the sublet part to be deemed to have been made? That was the vital point upon which the whole case ultimately depended.

The superior letting in this case was of a dwelling-house of the rateable value of £101 for a term of eighty years at a rent of £16 per annum. The part sublet was the basement and ground floor of that dwelling-house at a rent of £150. Upon the expiration of the head lease in 1954, the head landlord claimed possession against the subtenants, who contended, successfully, that as a result of the combined effect of section 41 of the Housing Repairs and Rents Act, 1954, section 15 (1) of the Landlord and Tenant Act, 1954, and section 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, they were, since 1954, protected by the Rent Acts. Section 41, it was held, must be read as if the notional separate lettings were both made to the tenant of the superior letting, so that the head tenant must in relation to the part sublet be deemed to have been a tenant of a dwelling-house of a rateable value of far less than £100. It was true that he must also be deemed to have been a tenant at a rent of only a just proportion of £16, which was far less than two-thirds of the rateable value of the part sublet. But under section 15 (1) of the Landlord and Tenant Act, 1954, the interest of a tenant of a house under a long tenancy is not to be disregarded for the purposes of section 15 (3) of the Act of 1920, by reason only that the rent payable in respect of that tenancy is less than two-thirds of the rateable value of the house. It followed from this that, although before 1954 the subtenants would not have been able to rely on the Rent Acts, because both the rateable value of the dwelling-house let under the head lease, and the lowness of the rent took it outside the protection of the Acts, since 1954 both these obstacles have ceased to exist, and section 15 (3) of the Act of 1920 is now available to them.

Percy E. Cadle & Co., Ltd. v. *Jacmarch Properties, Ltd.*
[1957] 2 W.L.R. 80; [1957] 1 All E.R. 148

Landlord and Tenant Act, 1954—*landlord's intention to reconstruct—meaning of "reconstruct."*—The point at issue in this case was the exact meaning of the word "reconstruct" in section 30 (1) (f) of the Landlord and Tenant Act, 1954. The premises consisted of shops on two floors and a basement intended for use as a storeroom. There was no connection between the ground floor and the first floor or between the ground floor and the basement except by outside steps. The landlords served notice on the defendants as tenants of the ground floor and basement to terminate their tenancy, and stated that they would oppose the grant of a new tenancy on the ground that they intended to "reconstruct the premises comprised in the holding or a substantial part of them." It was established that the landlords intended to modernise the building and make the three floors into one self-contained unit with inside staircases and to make certain other specified improvements. But the question was whether this work amounted to "reconstruction" within the meaning of section 30 (1) (f). The Court of Appeal held that there was evidence upon which the county

court judge could find that it did not. Denning L.J. (with whom both Hodson L.J. and Ormerod J. agreed) held that to amount to a reconstruction there must be in effect a rebuilding of the premises or of a substantial part thereof. Some structural work together with a metaphysical change of identity is not enough. There must be a substantial amount of physical demolition followed by rebuilding.

Biles v. *Caesar* [1957] 1 W.L.R. 156; [1957] 1 All E.R. 151

Landlord and Tenant Act, 1954—*joint landlords—notice of intention to demolish "the whole of the premises"—actual intention to demolish a substantial part only—proof of intention.*—Under section 30 (1) (f) of the Landlord and Tenant Act, 1954, a landlord may recover possession of premises if he can show that he intends "to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises." Two joint landlords gave notice of their intention to oppose a new tenancy on the ground that they intended to demolish and reconstruct the whole of the premises. In fact they only intended to demolish a substantial part. The tenant contended that the notice was bad on the ground that the words "or a substantial part of the premises" had been omitted. The Court of Appeal held that it is sufficient for a landlord who seeks to recover possession under section 30 of the Act to specify the paragraph of section 30 (1) upon which he relies. The landlords had done this. They had stated that they intended to demolish and reconstruct the whole of the premises, and the greater includes the less.

One further point arose. After service of the notice, but before the hearing one of the landlords died, and the landlord's intention was proved by the survivor and by the son of the deceased landlord, who was one of his executors. After the hearing but before judgment probate was taken out and the two executors were joined as parties to the action. In answer to an objection by the tenant that the relevant intention had not been proved, since probate had not been taken out at the date of the hearing, the court held that there had been sufficient proof for two reasons—(1) "landlord" means the landlord with the legal title and the survivor was sole legal landlord at the date of the hearing; and (2) the title of executors dates back to and speaks from the will.

Betty's Cafés, Ltd. v. *Phillips Furnishing Stores, Ltd.*
[1956] 3 W.L.R. 1134; [1957] 1 All E.R. 1

Landlord and Tenant Act, 1954—*landlord's intention to reconstruct—relevant time.*—The Court of Appeal has, by a majority, reversed the decision of Danckwerts J. in this case (see Volume 20, p. 334) in so far as he decided that a landlord who opposes the grant of a new tenancy under section 30 (1) (f) of the Landlord and Tenant Act, 1954, must show that he had the necessary intention at the time when he served his notice of opposition. In the view of both Birkett and Romer L.JJ. the landlord's notice is in the nature of a pleading,

and the relevant date for proof of the landlord's intention is the date of the hearing, that is to say it is open to the landlord to prove that he had the necessary intention right up to the moment when judgment is given.

At the time of the notice in this case the landlords had before them a plan for reconstruction and an estimate of the cost, but there was no resolution of the board of the landlord company authorising the necessary work. On April 16, 1956, when the hearing before Danckwerts J. began, there was still no resolution: but on April 23, 1956, while the hearing was still going on, a resolution was passed that the work should be carried out and counsel for the landlords was authorised to give an undertaking to that effect. Danckwerts J. held that this resolution was passed too late to be taken into account.

Birkett L.J. based his judgment largely on the wording of section 30 (1), when read as a whole. Paragraphs (a) (b) and (c), in his view, give the court a discretion to be exercised at the hearing: and under paragraphs (d) (e) and (f), the court must decide on material before it at the date of the hearing, not on the position as it was at the date of the notice. It is also necessary in his view to bear in mind the time which is likely to elapse between notice and hearing, during which great changes may take place.

Romer L.J., after observing that the word "intends" imports a fixed and settled as distinct from a provisional purpose (see *Cunliffe* v. *Goodman* [1950] 2 K.B. at p. 253), considered it to be clear from section 31 (1) (which provides that if a landlord establishes any of the grounds in section 30, the court shall not make an order) that the intention must exist at the date of the hearing, but by no means clear that such intention must exist at any earlier date. Indeed the requirement of a fixed intention at the date of the notice would, in his view, not only be of no advantage to the tenant, but it would also be likely to prejudice the landlord in that it might be impossible for him to make a decision ten months in advance, when he might not be in a position to know, for example, whether the necessary finance would be available. The belatedness of a landlord's intention would be relevant to its genuineness: but provided that a genuine intention exists at the close of the hearing, its belatedness would not be fatal.

Lord Evershed M.R., however, dissented. He agreed with Danckwerts J. that the relevant date is the date of the landlord's notice. Alternatively he thought it was the date upon which the landlord must state in proceedings instituted by the tenant whether he does or does not oppose the relief which the tenant seeks. "Intends," in his view, does not mean "is ready and able." The question whether intention has been proved must be answered by the ordinary standards of common sense; and intention will not be defeated by the mere fact that conditions which are not likely to be difficult to fulfil have not in fact been fulfilled. Further, the purpose of a landlord's notice is to show the tenant the case he will have to meet in the event of proceedings, and to enable him to make up his mind whether to incur the risk of proceedings or not. If the notice were a mere pleading, there would be no point in requiring the landlord to make his selection in advance. Difficulties and anomalies must, he acknowledged, arise on any view.

But he did not agree that his own view would cause hardship to the landlord without any compensating advantages to the tenant.

The position at the moment is that the case has been remitted to Danckwerts J. for reconsideration upon the footing that the notice of April 23, 1956, was not too late. It may yet go further.

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6. *REVENUE CASES*

By David R. Stanford, m.a., ll.b., Barrister-at-Law

(*Note*:—Where a case is not reported in any of the general series of law reports it is cited from *Annotated Tax Cases* (A.T.C.) and *Taxation Reports* (T.R.).)

Wigram Family Settled Estates, Ltd. (*In Liquidation*) v. *C. I. R.* [1957] 1 W.L.R. 233; [1957] 1 All E.R. 311; [1956] T.R. 445 (C.A.)

Surtax—investment company—apportionment

Statutory Provisions: Finance Act, 1922, s. 21 and Sched. I, para. 8 (now Income Tax Act, 1952, ss. 245 and 248).

Point: After a surtax direction has been made by the Special Commissioners the income of the company is then to be apportioned by the Special Commissioners "in accordance with the respective interests of the members." In *F.P.H. Finance Trust, Ltd.* v. *C. I. R.* (No. 2) [1946] A.C. 38 Lord Russell of Killowen said that, in apportioning the income amongst the members, the Special Commissioners "should determine who are the persons of whom it can be said (1) that they fall within the definition and (2) that they are the persons who, in view of all their interests in the company, are the persons really interested in the income in question and in what proportions." It is clear that the interests of the members need not be present interests in possession, but may be future interests. In the case of an investment company there is a specific direction that the Special Commissioners may have regard solely to the interests of the members in a winding up; even in a trading company, however, such interests may be taken into account in so far as the same are interests in income undistributed by the company.

It is essential to determine who are the persons who may now or at any time in the future benefit from the income of the company. Thus where income is set aside into a reserve fund, such reserve fund merely adds to the capital assets of the company and, unless it is by some means irrevocably appropriated to the benefit of a particular class of shareholders, such accumulation of income must be for the benefit of those shares which have participating rather than fixed rights in capital. In consequence, when the income falls to be apportioned pursuant to a surtax direction it is to those participating shares that the income will be credited.

Facts and decision: An investment company had a shareholding divided into four separate classes, three classes of preference shares and one of ordinary shares. Of the three classes of preference shares, one was redeemable. By the Articles of Association of the company a redeemable preference share redemption fund had to be credited with certain amounts of income (which would otherwise be available for distribution amongst the shareholders) in each year. Upon the company receiving an automatic direction for surtax purposes, the Commissioners apportioned income to the classes of preference shareholders, including the redeemable class, having regard only to their preference dividend rights, and apportioned the remainder of the income to the ordinary shareholders. The company contended that more income should be apportioned to the preference shareholders in lieu of the " interest " that they had in income placed in the redemption fund.

Held: By Vaisey J. and by the Court of Appeal, that the Special Commissioners were correct. The sums credited to the redemption fund merely formed an additional security for the rights of the preference shareholders and did not give then any additional interests in the company.

Escoigne Properties, Ltd. v. *C. I. R.* [1957] 1 W.L.R. 174; [1957] 1 All E.R. 291; [1956] T.R. 453 (C.A.)

Stamp Duty—conveyance on sale—exemption

Statutory provisions: Stamp Act, 1891, ss. 54 and 58 (4) and Sched. I: Finance Act, 1930, s. 42: Finance Act, 1938, s. 50.

Point: The Court of Appeal, reversing the decision of Vaisey J. (noted in Vol. 20, pp. 510–511), has restrictively construed the provisions of section 42 of the Finance Act, 1930, and thus prevented the transfer of property to companies being made without any charge to stamp duty. Mr. Cohen sold land to Company A but executed no conveyance. Company A sold land to Company B in which it owned beneficially 90 per cent. of the issued share capital. The latter company took a transfer direct from the executors of Mr. Cohen and claimed the conveyance to be exempt from *ad valorem* stamp duty. By the Finance Act, 1930, s. 42, an instrument is so exempt if " the effect thereof is to convey or transfer a beneficial interest in property " from one company to another, related as were those in this case. The Court of Appeal noted that the conveyance completed two separate transactions, namely the sale by Mr. Cohen to Company A and the sub-sale by Company A to Company B. Only the second of these was within the exempting provisions, the first not being merely a subsidiary or incidental effect. The court then held unanimously that an instrument with two main " effects " was not within the section unless both " effects " were separately within it. A distinction is therefore drawn between the getting of the legal estate from the vendor himself and from the person who sold to the vendor, the former being merely incidental to the transfer of beneficial ownership, the latter a substantive transaction.

The court further considered what effect section 50 of the Finance Act, 1938, would have had if the conveyance had otherwise been within section 42 of the Finance Act, 1930. That section removes from the exemption instruments " executed in pursuance of or in connection with an arrangement whereunder . . . (b) the beneficial interest in the property was previously conveyed or transferred directly or indirectly *by* " a person other than the relevant companies. Whilst all were of the opinion that the conveyance had been executed in connection with an arrangement, Romer L.J. differed from his brethren in his opinion that no previous transfer had been made *by* Mr. Cohen. The interest passed from Mr. Cohen to Company A by operation of law on payment of the purchase price, but the word " *by* " in the section suggests the execution or signature of some document. The Master of the Rolls (Birkett L.J. being of the same mind) considered that if a transfer from Mr. Cohen took place as a result of an arrangement entered into by Mr. Cohen with that intent, that transfer would be considered as having been made " indirectly by " Mr. Cohen.

The lack of difficulty found by the court in holding the formation of Company A and the agreement to transfer property to it to be " an arrangement," must be duly noted, for that vague and ill-defined word now occurs frequently in fiscal legislation.

Jackson v. *Laskers Home Furnishers, Ltd.* [1957] 1 W.L.R. 69; [1956] T.R. 391 (Ch.D.)

Deductible expenditure—repairs—capital or income nature

Statutory provisions: Income Tax Act, 1952, ss. 122, 137.

Point: This case emphasises that apart from statutory provisions there are in fact certain general principles in connection with income tax. Just as in general only income profits are taxable, so only expenditure on revenue account is deductible. Although in this case to the detriment of the taxpayer, it is pleasant once again to see the court emphasising that the form of the transaction governs the tax liability. The mere fact that a transaction which has taken place in one manner could have taken place in a different manner, having another result for tax purposes, cannot alter the tax liability pursuant to the method in fact adopted. Further, this case emphasises the necessity for looking at the receipts or expenditure in relation to the facts in the year in which they occurred, and not in relation to what has previously taken place. Where revenue expense for periodical maintenance might have been incurred from time to time by someone other than the taxpayer, the fact that the taxpayer incurs large expense in the form of a salvage operation cannot be tied to the revenue nature of the previous payments which might have been, but were not, made.

Facts and decision: The company took a lease of business premises for fourteen years. In addition to the usual covenant " to keep in repair," the more onerous covenant " to put in repair " was inserted. The premises were in a dilapidated condition and the latter covenant caused large expediture to be made. This was in fact offset by the

landlord taking a reduced rent during the first half of the term. The company claimed to deduct from their Schedule D profits the sums paid by them in putting the premises in a good state of repair pursuant to the covenant. The taxpayer's claim having been allowed by the Commissioners, the Crown appealed.

Held: That the expenditure was of a capital and not revenue nature and was not deductible. The accumulated repairs could not properly be attributed to the period of trading of the company, the necessity for them having been present at the time when the premises were taken over. Apart from the Income Tax Act, 1952, s. 137, which prohibits the deduction of certain types of expenditure, it is a general principle of the tax legislation that only expenditure of a revenue nature can be deducted. The fact that the lease might have been made at a higher rent, all of which would have been deductible, the burden of repair being placed on the landlord, did not mean that the incurring of the high initial outlay by the company to put the premises in repair was of a revenue nature. Some analogy may be perhaps taken with the case of a premium which is a capital payment, although thereby the revenue expenditure on rent may be reduced. In that case it is immaterial whether the premium is paid as a lump sum or spread over a period of years.

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7. *PLANNING CASE*

By T. A. Blanco White, Barrister-at-Law

Att.-Gen. v. *Bastow* [1957] 2 W.L.R. 340;
[1957] 1 All E.R. 497

Enforcement notice — non-compliance — injunction. — This case decides that the fact that a man who disregards an enforcement notice under the Town and Country Planning Act can be, and is, prosecuted for failing to comply with the notice, does not prevent recourse by the local planning authority to civil proceedings in the name of the Attorney-General for an injunction against repetition of the offence. It is for the Attorney-General to decide whether a particular case calls for a prosecution or a civil action, and if he decides that the case calls for civil proceedings then prima facie—in this or any other case of invasion of public rights—the court will grant the injunction. The court will, however, require to be satisfied that the case is not trivial, which means that there must be some indication that a prosecution would not be adequate to deal with the matter. In the present case, repeated prosecution had proved ineffective. There might also, perhaps, be cases raising points of law more appropriate for a civil than a magistrates' court; whether the Attorney-General would consider this good enough reason for intervening only he can say.

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8. *MISCELLANEOUS*

Re Camkin's Questions [1957] 1 W.L.R. 255; [1957] 1 All E.R 69

Fribance v. *Fribance* (*No.* 2) [1957] 1 W.L.R. 384; [1957] 1 All E.R. 375

Husband and wife—Married Women's Property Act, 1882, *s.* 17. —In the first of these cases, Wynn-Parry J., applying *Tunstall* v. *Tunstall* [1953] 1 W.L.R. 770, held that the court had no jurisdiction under the Married Women's Property Act, 1882, s. 17, to decide an issue whether one party owes a sum of money to the other of them: its jurisdiction is confined to deciding questions relating to property, *e.g.*, a credit balance on a bank account standing in the name of one of the parties, which, on the evidence before the court, is shown to exist.

In the second case, the Court of Appeal had before it the familiar dispute as to the beneficial title to the matrimonial home, the legal title to which was vested in the husband. The case is of interest as emphasising that the court has no jurisdiction to alter title to property under the section: the title "must remain the same, whether the question arises under section 17 before divorce, or in other proceedings after divorce, or under a will" (*per* Denning L.J., at [1957] 1 W.L.R. 388). In the particular case both parties were earning, the wife's money being used to help run the household and buy the children's clothes, while the husband saved and subsequently used the savings to buy the matrimonial home. It was held that the home belonged to them jointly.

THE LIBRARY

First Supplement to Hanson's Death Duties, 10th ed. By Henry E. Smith. Sweet & Maxwell, Ltd. v and 37 pp. (8s. 6d.)

This little supplement is justified by last year's Finance Act and The Double Taxation Relief (Estate Duty) (India) Order, 1956, the provisions of each of which are printed, with commentary, in appropriately numbered paragraphs, in the same style as the main volume.

In view of the length of time that has passed since the Finance Act received the Royal Assent, one might have anticipated that the commentary would be full and that recent cases would have received critical analysis. Apart, however, from a rather bold deduction from the decision in *Re Weigall's Will Trusts* [1956] Ch. 424, the cases are but noted. In particular, no comment is made on the interpretation, for the first time by the court, of the Finance Act, 1940, s. 45 (2) in *Re Stratton's Deed of Disclaimer* [1956] 3 All E.R. 862. The commentary on the troublesome sections of the Act is brief, and offers little assistance in interpreting the unusual case, for example, where the proviso to section 31 (3) is in point.

Both as regards size and content this is an expensive addition to the library—but, in the ever-changing world of fiscal legislation, unfortunately a necessary addition.

D. R. S.

Rent and Mortgage Interest Restrictions. Twenty-third Edition. By G. Avgherinos, B.A., Barrister-at-Law, and the Editors of *Law Notes*. li, 737 and (index) 44 pp. (£2 12s. 6d.)

This edition of *Law Notes* on the Rent Acts is in the form of its predecessors. There is an introductory sketch of forty-five pages outlining the whole subject, followed by the text in large clear type of all the Rent Acts and Acts directly referring to the Rent Acts, up to and including the Requisitioned Houses and Housing (Amendment) Act, 1955. Notes are appended to the various sections with cross-references and a discussion of the relevant case law, including cases reported up to July, 1956. It is therefore, the most up to date and comprehensive book on the Rent Acts available today.

That this kind of treatment obviously finds favour with many is demonstrated by the number of editions into which the book has passed. Your reviewer's difficulty is that he dislikes the method. The Acts are so involved and referential that he is grateful to writers on the subject who have extracted a measure of order by writing a continuous text. They thus avoid the necessity for the repetition of phrases such as "here it is convenient to mention," and "it must be noted, however," and they are more able by selection and arrangement to emphasise some of the principles which the courts have developed in applying the Acts.

Within the limitations of their method Mr. Avgherinos and the editors of *Law Notes* appear to have carried out their task carefully and thoroughly. The faults are of the type which must arise from the note form. Thus, on page 70, the difficult problem of conditional orders for possession is dealt with by referring to all the relevant cases, but the reader is largely left to sort out the result himself. Again, *Marcroft Wagons, Ltd.* v. *Smith* [1951] 2 K.B. 496 is only referred to once and very briefly in a note to section 16 (3) of the 1920 Act dealing with acceptance of rent after service of notice to quit. This may be justifiable but is not very helpful. However, for the practitioner who already has a working knowledge of the Acts and who believes that statute law should be studied in annotated statutes this should prove a useful book.

D. K.